DOCUMENT RESUME

ED 215 078 CE 031 024

AUTHOR	Long, David C.; And Others
TITLE	An Analysis of the Fiscal and Equity Provisions of the VEA. Volume 3. Part IV: Equity Provisions. Part V: Incentives, Oversight Mechanisms, and Sanctions.
INSTITUTION	Lawyers' Committee for Civil Rights Under Law, Washington, D.C.; Long and Silverstein, P.C., Washington, DC.
SPONS AGENCY	National Inst. of Education (ED), Washington, DC.
PUB DATE	Nov 81
CONTRACT	400-79-0033
NOTE	313p.; For related documents see CE 031 022-023.
EDRS PRICE	MF01/PC13 Plus Postage.
DESCRIPTORS	Access to Education; Civil Rights; *Compliance (Legal); Disabilities; Disadvantaged; *Equal Education; *Federal Legislation; Federal Regulation; Federal State Relationship; Financial Policy; *Incentives; Postsecondary Education; Public Policy; Sanctions; Secondary Education; *Sex Fairness; *Vocational Education
IDENTIFIERS	*Vocational Education Act 1963

ABSTRACT

As part of a study of the Vocational Education Act (VEA) (see note), equity provisions were examined and the adequacy of incentives, oversight mechanisms, and sanctions in the VEA was addressed. Three areas of equity were studied: federal civil rights laws and regulations; provision of funds in the VEA to help recipients meet their civil rights obligations to handicapped and limited-English-proficient students and to assist recipients to help disadvantaged students; and the mechanisms and processes contained in the VEA which are designed to overcome sex discrimination and sex stereotyping and lead to the elimination of sex bias. Major problems between intent of the Act and compliance as a result of vague wording and unclear rules were identified and recommendations for clarifying or changing these provisions were made. An analysis of the use of incentives in the VEA showed that the incentives included do not induce states to exceed the minimum desired behaviors; however, because of the structure of the vocational education funding establishment, no major changes were recommended. In regard to oversight mechanisms and sanctions, it was found that the structure of the basic enforcement system is sound; however, several significant problems with the language of certain sections were found and recommendations made to correct them. (KC)

****
* Reproductions supplied by EDRS are the best that can be made *
* from the original document. *
****

ED215078

VOLUME 3

AN ANALYSIS OF THE FISCAL AND EQUITY PROVISIONS OF THE VEA

- PART IV (EQUITY PROVISIONS)
- PART V (INCENTIVES, OVERSIGHT MECHANISMS AND SANCTIONS)

Prepared by

Long and Silverstein, P.C.
1725 I Street, N.W.
Suite 503
Washington, D.C. 20006
(202) 466-7550

November, 1981

CE 031 024

U.S. DEPARTMENT OF EDUCATION
NATIONAL INSTITUTE OF EDUCATION
EDUCATIONAL RESOURCES INFORMATION CENTER (ERIC)

☑ This document has been reproduced as received from the person or organization originating it.
☐ Minor changes have been made to improve reproduction quality.

- Points of view or opinions stated in this document do not necessarily represent official NIE position or policy.

"PERMISSION TO REPRODUCE THIS MATERIAL HAS BEEN GRANTED BY

Long & Silverstein, P.C.

TO THE EDUCATIONAL RESOURCES INFORMATION CENTER (ERIC)."

PREFACE AND ACKNOWLEDGEMENTS

This is Volume 3 of a paper prepared by Long and Silverstein, P.C. for the National Institute of Education entitled An Analysis of the Fiscal and Equity Provisions of the VEA. Volume 3 contains Part IV of the paper (an analysis of the equity provision of the VEA) and Part V (an analysis of the incentives, oversight mechanisms and sanctions). Volume 1 which is separately bound contains Part I (Introduction) and Part II (Summary of Major Findings, Conclusions, and Recommendations). Volume 2 which is also separately bound, contains Part III (an analysis of the fiscal provisions).

In preparing this paper, special acknowledgements are made to David C. Long, Robert Silverstein, Sandra H. McMullan, and Jean Johnson of Long and Silverstein, P.C.; Michael Gaffney of Gaffney, Anspach, Schember, Klimaski and Marks, P.C.; Judy Sinkin, Consultant; and Craig McLaurin of the Lawyers' Committee for Civil Rights Under Law.

The work upon which this paper is based was performed pursuant to contract 400-79-0033 between the National Institute of Education and the Lawyers' Committee for Civil Rights Under Law (Contractor) and Long and Silverstein, P.C. (subcontractor). It does not necessarily represent the views of the National Institute of Education or the Lawyers' Committee for Civil Rights Under Law. The statements made are those of Long and Silverstein, P.C.

SUMMARY

Table of Contents

Part IV

Page

Chapter 6: Summary of Part IV

I. Purpose and Organization 6-1

II. Compliance With Civil Rights Laws 6-2

- A. Legal Framework 6-2
- B. Major Findings and Conclusions 6-2
- C. Major Recommendations 6-4

III. VEA Assistance for Special Needs Population 6-5

- A. Overview 6-5
- B. Minimum Percentage Set-Aside 6-5
- C. The Matching Requirement 6-6
- D. Excess Costs 6-8
- E. Program Design and Implementation Provision 6-10

IV. Sex Equity 6-13

- A. Legal Framework 6-13
- B. Major Findings, Conclusions and Recommendations ... 6-15

Chapter 7: Compliance With the Civil Rights Laws

I. Introduction 7-1

- A. Purpose and Organization of the Chapter 7-1
- B. Overview of the Major Findings, Conclusions, and Recommendations 7-2

II. Overview of the Applicable Federal Civil Rights Laws and Regulations, OCR Guidelines and Their Relationship to the VEA 7-6

- A. Civil Rights Laws and Regulations 7-6
- B. OCR Guidelines 7-9
- C. Relationship Between Civil Rights Laws, OCR Guidelines and the VEA 7-15

III. Factual Bases for the Guidelines - Possible Problems of Discrimination in Vocational Education 7-16

- A. Introduction 7-16
- B. Civil Rights Issues Between 1974-1977 7-16
- C. Civil Rights Issues Between 1977-1980 7-20

IV. Standards for Determining Discrimination 7-26

A. Identifying a Possible Violation and Establishing Presumptions 7-26
B. Rebutting the Presumption 7-34

V. The Federal Role in Securing Compliance With the Civil Rights Statutes and OCR Guidelines 7-36

A. The Office for Civil Rights 7-36
B. Standards for Compliance and Enforcement 7-37
C. OCR Methods for Securing Compliance and Enforcement 7-38
D. Relationship Between OCR and OVAE 7-42

VI. State Role in Securing Compliance With the OCR Guidelines 7-43

A. Description of the Legal Framework 7-43
B. Analysis of the Legal Framework 7-52

Chapter 8: VEA Assistance for Special Needs Population

I. Introduction and Overview 8-1

A. Purpose and Organization of the Chapter 8-1
B. Overview of the Major Findings, Conclusions, and Recommendations............................ 8-2

II. The Minimum Percentage Requirements 8-16

A. Description of the Legal Framework 8-16
B. Analysis of the Set-Asides for the Disadvantaged and Handicapped 8-20

III. The Matching Requirements for the Set-Asides 8-25

A. Description of the Legal Frmaework 8-25
B. Analysis of the VEA Matching Provision for Set-Asides 8-30

IV. The Excess Costs Provision 8-35

A. Description of the Legal Framework 8-35
B. Analysis of the Excess Costs Provision........... 8-37

V. Programs for Disadvantaged Children 8-43

A. Introduction 8-43
B. Description of the Legal Framework 8-43
C. Analysis of the Legal Framework for the Set-Aside and Subpart 4 8-49

VI. Programs for Handicapped Students 8-52

A. Introduction 8-52
B. Description of the Legal Framework 8-52
C. Analysis of the Legal Framework 8-55

Chapter 9: Sex Equity

I. Introduction 9-1

A. Organization of the Chapter 9-1
B. Congressional Interest in Sex Equity 9-2
C. Overview of the Major Sex Equity Mechanisms 9-7
D. Major Findings, Conclusions, and Recommendations.. 9-15

II. Mandatory Expenditures of VEA Funds 9-20

A. Introduction 9-20
B. $50,000 for Full-Time Personnel 9-20
C. Displaced Homemakers and Other Special Groups 9-26

III. Authorized Uses of Funds 9-33

A. Introduction 9-33
B. Authorized Uses Under Subpart 2 9-33
C. Authorized Uses Under Subpart 3 9-37

IV. State Policies and Activities 9-46

A. Introduction 9-46
B. The Functions of the Full-Time Sex Equity Personnel 9-46
C. Policies for Eradicating Sex Bias (Including Incentives) 9-55
D. Description of Uses in State Planning Documents .. 9-63
E. Results of Policies and Activities 9-66

V. Local Policies 9-70
  A. Introduction 9-70
  B. Description 9-70
  C. Findings, Conclusions, and Recommendations 9-75

Part V

Chapter 10: Incentives

Page

I. Introduction 10-1
II. The Meaning, Types, and Uses of Incentives 10-1
  A. Definition of the Term 10-1
  B. Types of Incentives 10-1
  C. Rationale for Using Incentives 10-3
III. Description and Analysis of VEA Applicable to State's Incentives 10-4
  A. Description of the Incentive 10-4
  B. Analysis of the Incentive 10-4
IV. Description and Analysis of the Incentives in the VEA Applicable to Local Recipients 10-8
  A. Description of the Incentives 10-8
  B. Analysis of the Incentives 10-10

Chapter 11: Oversight Mechanisms and Sanctions

I. Introduction 11-1
  A. Purpose and Organization of Chapter 11-1
  B. Overview of the Major Findings, Conclusions, and Recommendations 11-4
II. Provisions in the VEA Designed to Ensure that the Federal Government Carries Out Its Responsibilities. 11-7
  A. Introduction 11-7
  B. National Advisory Council on Vocational Education (NACVE) 11-8
  C. Review of State Submissions By Other Agencies Within The Department of Education 11-8
  D. Minimum Staff Assignments 11-9
  E. Reports to Congress 11-11
  F. Analysis of the Requirements 11-11
III. Description and Analysis of the Mechanisms in VEA and GEPA Used to Oversee the Appropriate Use of VEA Funds by States 11-13
  A. Introduction 11-13

Page

B. Reviewing and Preparing Written Analysis 11-14
C. Conducting On-Site Reviews 11-22
D. Analysis of the Legal Framework 11-23
E. Conducting Fiscal Audits 11-24
F. Reviewing State Board Rejections of Agency and Council Recommendations 11-25
G. State Advisory Councils on Vocational Education. 11-29

IV. Description and Analysis of the Sanctions Used by ED to Secure Compliance 11-30
A. Introduction 11-30
B. Withholding Approval of the State Plans and Reports 11-30
C. Withholding and Suspending Payments 11-30
D. Recoupment of Misspent Funds 11-36
E. Cease and Desist Orders 11-37
F. Payback Provision 11-37

V. Description and Analysis of Oversight Mechanisms in VEA and GEPA Used to Ensure Compliance by LEAs and Other Eligible Recipients 11-38
A. Introduction 11-38
B. Review of Applications 11-39
C. State Evaluations 11-42
D. Monitoring 11-48
E. Auditing....................................... 11-49
F. Complaint Resolution 11-49

VI. Sanctions Which States May Use To Secure Compliance. 11-51
A. Introduction 11-51
B. Description of Sanctions 11-51
C. Analysis of Sanctions 11-52

CHAPTER 6

SUMMARY OF PART IV

CHAPTER 6

SUMMARY OF PART IV

Page

I. Purpose and Organization 1

II. Compliance With Civil Rights Laws 2

- A. Legal Framework 2
- B. Major Findings and Conclusions 3
- C. Major Recommendations 4

III. VEA Assistance for Special Needs Population 5

- A. Overview 5
- B. Minimum Percentage Set-Aside 5
  1. Legal Framework 5
  2. Major Findings and Conclusions 6
  3. Major Recommendations 6
- C. The Matching Requirement 6
  1. Legal Framework 6
  2. Major Findings and Conclusions 7
  3. Major Recommendations 7
- D. Excess Costs 8
  1. Legal Framework 8
  2. Major Findings and Conclusions 9
  3. Major Recommendations 10
- E. Program Design and Implementation Provision 10
  1. Legal Framework 10
  2. Major Findings and Conclusions 10
  3. Major Recommendations 12

IV. Sex Equity 13

- A. Legal Framework 13
- B. Major Findings, Conclusions and Recommendations 15
  1. General Finding 15
  2. Specific Findings, Conclusions, and Recommendations 15
     a. Mandatory expenditures for full-time sex equity personnel 15

b. Mandatory expenditures for displaced homemakers and other special groups 16
c. Authorized uses of funds 17
d. Functions of the sex equity coordinator.. 17
e. Policies for eradicating sex bias (including incentives).................. 17
f. Results of policies and activities....... 18
f. Local policies 18

CHAPTER 6

SUMMARY OF PART IV

I. Purpose and Organization

The purpose of this chapter is to summarize the research conducted by the Legal Standards Project on the major equity requirements of the VEA.

Three areas of equity are examined in this part:

(1) the Federal civil rights laws and regulations which prohibit discrimination by recipients of Federal financial assistance;

(2) the provision of funds in the VEA to help recipients meet their civil rights obligations to handicapped and limited-English-proficient students and to assist recipients provide equal opportunity to students who are not protected by civil rights statutes but are otherwise in need of special assistance (*e.g.*, disadvantaged students); and

(3) the mechanisms and processes contained in the VEA which are designed to overcome sex discrimination and sex stereotyping and lead to the elimination of sex bias.

The clarity, consistency and adequacy of each of these three areas of equity are analyzed in detail in separate chapters in this part. Chapter 7 analyzes the civil rights statutes; Chapter 8 analyzes the provision of funds for special need populations; and Chapter 9 analyzes the mechanisms and processes in the VEA pertaining to sex equity.

This chapter outlines the legal framework, the major findings and conclusions and the major recommendations for each of these three equity areas.

II. Compliance With Civil Rights Laws

A. Legal Framework

Congress has enacted four laws prohibiting discrimination by recipients of Federal financial assistance. Three of these statutes are analyzed in this part: Title VI of the Civil Rights Act of 1964, which prohibits discrimination on the basis of race, color and national origin (Title VI);[1] Title IX of the Education Amendments of 1972 which prohibits discrimination on the basis of sex by educational institutions receiving Federal financial assistance (Title IX);[2] and Section 504 of the Rehabilitation Act of 1973 which prohibits discrimination by recipients on the basis of handicap (Section 504).[3] The fourth civil rights law made applicable to recipients, The Age Discrimination Act of 1975[4] which prohibits discrimination on the basis of age, is not part of our review.

On March 21, 1979, the Department of HEW published in the Federal Register guidelines explaining the civil rights responsibilities of recipients of Federal funds offering or administering vocational education programs (OCR Guidelines).[5]

---

[1] 42 U.S.C. 2000d - 2000d - 4; 34 C.F.R. Part 100.

[2] 20 U.S.C. 1681, 1682; 34 C.F.R. Part 106.

[3] 29 U.S.C. 794; 34 C.F.R. Part 104.

[4] Section 303; 42 U.S.C. 6101; 45 C.F.R. Part 90 (Jurisdiction over the Age Discrimination Act is still undecided).

[5] 44 F.R. 17162-17175. These guidelines were issued as a result of injunctive orders entered by a Federal district court in Adams vs. Califano and because the Department found evidence of continuing discrimination in vocational education programs. 44 F.R. 17162 (March 21, 1979).

The Vocational Education Guidelines are applicable to recipients of financial assistance from ED that offer or perform administrative oversight responsibilities with respect to programs of vocational education and training, including state agency recipients. The Guidelines require state agencies to adopt a compliance program and to submit Methods of Administration (MOAs) and an annual compliance report for ED's review. The Guidelines pertain to the distribution of funds, the adoption of admissions criteria, approval of applications, employment, and the operation of programs.

B. Major Findings and Conclusions

We found that many persons did not fully grasp the relationship between the OCR Guidelines and the VEA. The OCR Guidelines contain the standards for ensuring equal opportunity, *i.e.*, civil rights which may not be abridged by recipients, regardless of costs. One of the primary objectives of the VEA is to provide financial assistance to help recipients meet their civil rights obligations. In other words, VEA funds may be used to relieve the financial strains placed on recipients resulting from the extra costs sometimes associated with ensuring equal and effective opportunity. If a recipient chooses not to apply for set-aside funds for the handicapped but receives other Federal assistance, it still must ensure equal opportunity for all students, including handicapped students, and pay for the costs associated with such an obligation from other available sources.

We also found that the OCR Guidleines place a heavy emphasis on statistics to either identify potential problems requiring further inquiry or to establish presumptions of discrimination which may be rebutted by recipients. Under the OCR Guidelines presumptions of discrimination are established where statistics demonstrate "*disproportionate adverse effect*", "*disproprotionate exclusion*", "*predominant* enrollment" and "attendance *primarily* by members of the protected class." The standards are not sufficiently clear to ensure uniformity of interpretation as to whether a particular imbalance creates a presumption of discrimination. Further, an objective standard appropriate for one issue (*e.g.*, funds distribution) may be totally inappropriate for another issue (*e.g.*, admissions criteria).

By contrast, we found that OCR's guidance with respect to the "methods of administration" states must adopt to oversee compliance by local recipients to be a clear and comprehensive statement of expectations.

C. Major Recommendations

We recommend that OCR establish objective "rules-of-thumb" for purposes of establishing presumptions of discrimination which rely on statistics. Furthermore, OCR should clarify when statistics indicate that further inquiry must be undertaken (without necessarily establishing a presumption of discrimination) and when statistics establish a presumption of discrimination. We also recommend that OCR provide further policy guidance regarding what it will consider acceptable rebuttals.

Given this substantial reliance on statistics, it is essential that whatever changes are made to the VEA recordkeeping and reporting requirement, the revised Act continue to require adequate documentation to enable a state agency or OCR to determine compliance with the OCR Guidelines.

III. VEA Assistance for Special Needs Population

A. Overview

The second part of the Federal strategy for ensuring equal opportunity is to provide Federal financial assistance to help recipients meet their civil rights obligations and to assist recipients provide equal opportunity to students who are not otherwise protected by civil rights statutes but who are in need of special assistance, *e.g.*, academically and economically disadvantaged students. The primary mechanisms in the VEA include: (1) national priority set-asides for handicapped and disadvantaged students (including limited-English-proficient students, (2) subpart 4 (special programs for the disadvantaged), and (3) program design requirements governing the use of set-aside and subpart 4 funds.

B. Minimum Percentage Set-Aside

1. Legal Framework

Under section 110 of the VEA, a total of 30 percent of the aggregate amount of funds available under section 102(a) must be used for handicapped and disadvantaged students. Separate percentage set-asides are required for disadvantaged and handicapped students and the set-aside for the disadvantaged has an internal percentage set-aside for persons with limited-English-speaking ability (LESA). Moreover, these set-asides are mutually exclusive, that is, funds used to meet one may not be counted towards the funds required to meet another national priority set-aside.

2. Major Findings and Conclusions

With respect to the first component of the set-aside in the existing VEA, the minimum percentage requirement, we conclude that this provision is a viable mechanism for ensuring that additional VEA funds are expended on disadvantaged and handicapped students in furtherance of the VEA objective of assisting recipients to provide equal and effective access to programs for such students.

3. Major Recommendations

We recommend that the minimum percentage requirements be retained because it is a viable strategy for assisting recipients provide equal opportunity to special needs populations.

C. The Matching Requirement

1. Legal Framework

The second component of the set-aside is the matching provision. The 1976 Amendments to the VEA require that the Federal dollars spent under the handicapped set-aside be matched dollar-for-dollar with state and local dollars to pay for the excess costs of services to these students. Similarly, Federal dollars for the disadvantaged must be matched dollar-for-dollar with state and local funds for the disadvantaged.

However, the 1979 Technical Amendments authorize states, pursuant to regulations to be established by the Secretary, to increase the Federal share of set-aside programs for handicapped and disadvantaged (including LESA) and stipends to amounts greater than 50 percent (and reduce the state share accordingly) for LEAs and OERs which are otherwise financially unable to provide matching payments. To date, the Secretary has not issued final regulations. The absence of final regulations implementing the 1979 Technical Amendments means that states are unable to take advantage of the more flexible provisions contained in the amendments.

2. Major Findings and Conclusions

We found that the matching component raised four issues which Congress should review.

(a) Whether the matching provisions for special needs populations should be repealed or substantially modified;

(b) Whether the matching provisions are achieving the intended objectives of generating additional state and local dollars for special needs populations;

(c) Whether the matching provisions are causing undesirable consequences for state and local fiscal stability; and

(d) Whether the matching provisions frustrate the achievement of other VEA objectives.

3. Major Recommendations

The fundamental issue with respect to the matching provisions of the set-asides for special needs populations is whether they should be repealed or substantially modified. If Congress repeals the matching provisions relating to other aspects of the VEA, it should also repeal the matching provisions applicable to the set-asides for the reasons set out in chapter 5. However, if Congress decides to generally retain matching we recommend that Congress use the following analytic framework for addressing the issues for the set-asides. The proposed framework is derived from a recent GAO study on matching provisions in Federal programs:

(1) What is the rationale for the matching provision applicable to the set-asides for special needs populations?

(2) Is it achieving its intended objectives?

(3) Is it causing undesirable consequences for state and local fiscal stability and independence?

(4) Does it tend to frustrate the achievement of other Federal objectives, e.g., funding local recipients most in need?

(5) Do comparable laws contain matching provisions? If not what makes the matching provision in the VEA unique?

D. Excess Costs

1. Legal Framework

The third major component of the set-aside provision for special needs populations is the excess costs requirement. As explained above, states must separately match VEA funds set-aside for handicapped persons and disadvantaged persons (including limited-English-speaking persons and stipends). The match for the set-asides for handicapped and disadvantaged persons (including limited-English-speaking persons) is based on the excess cost of programs, services and activities for such persons. The excess costs concept does not apply to stipends.

Excess costs are the costs of special educational and related services above the costs for non-handicapped students, non-disadvantaged persons and persons who are not classified as persons of limited-English-speaking ability, i.e., the additional costs associated with ensuring equal opportunity. OE has interpreted the excess cost requirement as having a different application for mainstreamed programs (VEA can only pay for excess costs) than for separate specialized programs for such persons (VEA can pay for the full costs).

2. Major Findings and Conclusions

Several problems and issues with respect to the excess costs provisions were identified by the project. First, several persons expressed a concern with the burden of keeping records to demonstrate compliance with the excess costs regulations. The burdens and problems identified are that: (1) LEA accounting systems are not geared to provide the type of documentation required by the regulations, (2) the interpretation that LEAs operating separate programs may use VEA funds to pay for the full costs rather than the excess costs acts as a disincentive to mainstream special needs students, and (3) the small amount of funds made available under the set-asides when compared with the administrative burden of keeping adequate records has the effect of discouraging applications for the assistance or results in noncompliance with the requirements.

We conclude that the inclusion of an excess costs provision or an equivalent is necessary to ensure that VEA set-aside funds are used to pay only for the extra costs associated with ensuring equal opportunity for special needs populations. However, we conclude that the excess costs provision, as presently interpreted by ED, should not be retained since it is unclear, vague, internally inconsistent, overly burdensome, and creates disincentives to comply with VEAs objectives of mainstreaming special needs students.

3. Major Recommendations

We recommend that the excess cost concept be retained and specifically included in the VEA. However, we recommend that the excess costs provision, as presently interpreted by ED should not be retained since it is unclear, vague, internally inconsistent, overly burdensome, and creates disincentives to comply with the VEA's objectives of mainstreaming special needs students. We recommend that the interpretation of excess costs under the VEA be modified to balance the need to avoid VEA set-aside funds being used as general aid or property tax relief with the administrative burdens associated with demonstrating compliance.

E. Program Design and Implementation Provision

1. Legal Framework

The VEA legal framework contains: (1) definitions of students considered to be handicapped or disadvantaged and therefore eligible to receive these additional services; (2) requirements as to the mainstreaming of special students into the regular vocational education programs; and (3) standards governing the allowable expenditures for programs for handicapped and disadvantaged students.

2. Major Findings and Conclusions

With respect to the set-asides for disadvantaged students, we identified four problems:

(1) The definition of the term "disadvantaged" is unclear;

(2) The relationship between the set-aside for the disadvantaged in subpart 2 and subpart 4 is unclear;

(3) The relationship between the set-aside and subpart 4 programs and compensatory education programs like Title I of ESEA is unclear; and

(4) The VEA legal framework lacks adequate specificity to maximize the likelihood that set-asides and subpart 4 funds are used to fund programs for a limited number of children which are of sufficient size, scope, and quality.

With respect to the set-aside for handicapped students we identified three problems:

(1) The definition of "handicapped" student is not appropriate for post-secondary recipients;

(2) The relationship between funds provided under the VEA and Part B of EHA is unclear; and

(3) The relationship between special and vocational educators in the placement of handicapped students in and the design, implementation, and evaluation of vocational education programs has not been clear.

We conclude that the specific requirements governing the design, implementation, and evaluation of VEA programs by local recipients for disadvantaged students are not sufficiently clear and comprehensive to maximize the likelihood that funds will be used in an effective and efficient manner. Given the limited size of the appropriations for disadvantaged students, it is essential that these limited dollars not be spread so thinly that they have little, if any, effect.

The provision applicable to handicapped students in secondary schools is generally adequate because it requires that LEAs use VEA funds in accordance with the comprehensive standards set out in P.L. 94-142. The legal framework governing programs for handicapped students in post-secondary institutions is inadequate but could be made adequate through a simple reference to the regulations implementing Section 504 of the Rehabilitation Act of 1973.

3. Major Recommendations

We recommend that Congress amend the VEA definition of "disadvantaged" students to clarify which students are covered and to simplify the relationships between vocational education and other programs such as Title I. We also recommend that this definition clarify the situations in which handicapped children may receive assistance under the set-aside for the disadvantaged.

With respect to the interrelationship between subparts 2 and 4 we recommend that these parts be combined into a single set-aside fo disadvantaged students. If subpart 4 was folded in subpart 2, the coordination problems currently identified would not occur.

We also recommend that the disadvantaged program activities be amended to ensure that VEA funds are applied with sufficient size, scope and quality to increase the likelihood that programs will be successful.

With respect to the set-aside for handicapped students, we recommend that the definition of "handicapped students" in post-secondary education be amended. Specifically, we recommend that the definition of handicapped persons in the Section 504 regulation be adopted.

We also recommend that Congress clarify whether it intends the VEA set-aside for handicapped students to be used in lieu of, as well as in addition to other Federal funds for handicapped children.

Finally, we recommend that Congress consider amending the VEA to formalize the relationship between special education and vocational education instructors.

IV. Sex Equity

A. Legal Framework

A major purpose of the Vocational Education Amendments of 1976 was the enactment of provisions to overcome sex discrimination and sex stereotyping in occupational programs and to lead to the elimination of sex bias.

The 1976 VEA contains several categories of mechanisms or processes designed to help achieve congressional purposes with respect to sex equity in vocational education. These categories include: Federal mechanisms, state structures and processes, and local processes. To advance toward congressional objectives concerning set equity in vocational education, Federal administrators use routine oversight mechanisms common to many Federal education programs, e.g., approval of state plans, monitoring, auditing and evaluation, as well as other Federal-level mechanisms oriented more specifically toward sex equity in vocational education.

These mechanisms specified in the VEA include:

(1) Representation on the National Advisory Council on Vocational Education (NACVE);

(2) Federal level discretionary grants for "programs of national significance";

(3) Data collection on the sex of participating students through the Vocational Education Data System (VEDS);

(4) Leadership development rewards and fellowships.

The VEA contains eight requirements that are designed to increase the likelihood of achieving sex equity in vocational education:

(1) States must spend no less than $50,000 in each fiscal year for a full-time sex-equity coordinator;

(2) States must submit five-year plans, annual plans and accountability reports to the Secretary with specific components describing sex equity activities;

(3) States must hold public hearings on the five-year plan, annual plans and accountability reports;

(4) The State Advisory Council on Vocational Education (SACVE) must include the appropriate representation of women and must assist with the planning for program activities.

(5) States are authorized to use subpart 2 funds for day care services and other support services for women and are required to use some portion for categories of displaced homemakers and persons seeking non-traditional employment;

(6) Subpart 3 funds may be used for sex equity purposes;

(7) Subpart 5 funds for consumer and homemaking must be used for specified purposes related to sex equity; and

(8) States must establish compliance programs to prevent, identify and remedy discrimination on the basis of sex by subrecipients.

The VEA and its regulations contain two provisions which apply the sex equity goals of the VEA to the VEA recipients.

(1) LEAs and OERs must submit applications prior to receiving funds which reflect their review of student vocational education needs; and

(2) Each LEA or OER must establish a Local Advisory Council on Vocational Education (LACVE) which includes an appropriate representation of women.

B. Major Findings, Conclusions, and Recommendations

1. General Finding

We conclude that the sex equity mechanisms and processes Congress built into the Act do not ensure that all states will "take vigorous action" to overcome sex discrimination and sex stereotyping in vocational education.

The primary reason is that much is authorized, but little is required with respect to the expenditure of VEA funds to achieve sex equity in vocational education. The only expenditures specifically required are: (1) $50,000 for full-time sex equity personnel in each state, regardless of size, population, or the number of school districts, and (2) not less than an amount the state "deems necessary" for displaced homemakers and certain other special groups. A state does not have to spend VEA funds on grants to overcome sex bias and sex stereotyping, on supportive services for women, or on other sex equity activities that are authorized but not required. The legal provisions concerning sex equity in the VEA must be strengthened considerably if congressional intent with respect to "carry[ing] out all programs of vocational education in such a manner as to be free from sex discrimination and sex stereotyping" is to be realized.

2. Specific Findings, Conclusions, and Recommendations

a. Mandatory expenditures for full-time sex equity personnel -- A statutory requirement that Federal funds be used to support a sex equity coordinator at the state level is necessary if the functions assigned to the coordinator are to be carried out. There is evidence indicating that Federal funds would not be spent for this purpose in some states if it were not required. Mandatory expenditures for full-time sex equity personnel should continue if Congress wishes to overcome sex discrimination, bias, and stereotyping in vocational education.

The Tydings Amendment, which permits funds not obligated by the end of one fiscal year to be carried over for use in the next fiscal year, has undercut the requirement that states spend not less than $50,000 each fiscal year for full-time sex equity personnel. We recommend that the VEA be amended to provide expressly that the Tydings Amendment does not apply to the mandatory expenditure for full-time sex equity personnel under the VEA.

The uniform amount of $50,000 per state for full-time sex equity personnel makes little sense because it fails to take into account a state's size, population, and number of school districts. We recommend that this provision be amended to make the amount of VEA funds reserved for full-time sex equity personnel a function of the size of the state's allocation under the VEA, with $50,000 becoming the minimum amount every state must expend.

b. Mandatory expenditures for displaced homemakers and other special groups -- The relationship between the requirements (1) that the state fund programs to "assess and meet the needs" of displaced homemakers and other special groups and (2) that the state expend not less than the amount it deems "necessary" is unclear. We recommend that the relationship between these requirements be clarified.

c. Authorized uses of funds -- The requirement that all state contracts for exemplary and innovative projects give "priority" to programs and projects designed to reduce sex bias and sex stereotyping in vocational education is unclear. We recommend that there be clarification of how states are to give such projects priority.

d. Functions of the sex equity coordinator -- There is overlap among the ten functions sex equity coordinators must perform. The ten functions can be reorganized and consolidated into five functions without losing any functions. We recommend that this be done.

There are no clear standards concerning adequate performance of each of the functions the sex equity coordinator must perform. We recommend that such standards be developed.

e. Policies for eradicating sex bias (including incentives) -- The provision requiring that the state provide incentives for eligible recipients: (1) to encourage the enrollment of both men and women in non-traditional courses; and (2) to develop model programs to reduce sex bias and sex stereotyping is unclear and inadequate. Publicity and plaques have not proven to be effective incentives. Two forms of incentives appear to be effective: (1) a set-aside of funds; and (2) giving priority to local applications proposing to address sex equity concerns. If Congress is interested in effective incentives, we recommend that Congress adopt either or both of these forms of incentives.

f. Results of policies and activities -- The requirement that states report in their annual plan the "results" of compliance with the five-year state plan's equal access policies and procedures appears to be unclear because most states are reporting activities rather than results. We recommend that "results" be defined in outcome or impact terms and that the states' obligation to report "results" in such terms be clarified.

g. Local policies -- The present criteria for local applications are inadequate because they do not require that a local application provide the state with any information concerning the sex equity situation and activities. We recommend that local applications be required to contain such information.

CHAPTER 7

COMPLIANCE WITH THE CIVIL RIGHTS LAWS

CHAPTER 7

COMPLIANCE WITH THE CIVIL RIGHTS LAWS

Page

I. Introduction 1

- A. Purpose and Organization of the Chapter 1
- B. Overview of the Major Findings, Conclusions, and Recommendations 2

II. Overview of the Applicable Federal Civil Rights Laws and Regulations, OCR Guidelines and Their Relationship to the VEA 6

- A. Civil Rights Laws and Regulations 6
- B. OCR Guidelines 9
  - 1. Scope of the Guidelines 10
  - 2. Guidelines Pertaining to the Performance of Oversight Responsibilities by State Agencies ... 11
  - 3. Guidelines Pertaining to Funds Distribution 11
  - 4. Guidelines Pertaining to the Adoption of Admissions Criteria, the Approval of Applications, and Employment 12
  - 5. Guidelines Pertaining to the Operation of Programs 13
    - a. Overview of major decisions 13
    - b. Decisions particularly overlapping VEA provisions 14
- C. Relationship Between Civil Rights Laws, OCR Guidelines and the VEA 15

III. Factual Bases for the Guidelines - Possible Problems of Discrimination in Vocational Education 16

- A. Introduction 16
- B. Civil Rights Issues Between 1974-1977 16
- C. Civil Rights Issues Between 1977-1980 20

Page

IV. Standards for Determining Discrimination 26

A. Identifying a Possible Violation and Establishing Presumptions 26

1. Description of the Legal Framework 26

a. Overview 26

b. Use of statistics to identify areas requiring further inquiry 26

c. Use of statistics to establish presumptions of discrimination 28

2. Analysis of the Legal Framework 31

B. Rebutting the Presumption 34

1. Description of the Legal Framework 34

2. Analysis of the Legal Framework 35

V. The Federal Role in Securing Compliance With the Civil Rights Statutes and OCR Guidelines 36

A. The Office for Civil Rights 36

B. Standards for Compliance and Enforcement 37

C. OCR Methods for Securing Compliance and Enforcement 38

1. Approval of State Agency Methods of Administration 38

2. Compliance Reviews 39

3. Monitoring 40

4. Complaint Investigation 41

5. Analysis of Enrollment and Related Data 41

6. Proceedings to Terminate or Withhold Findings.. 42

D. Relationship Between OCR and OVAE 42

Page

VI. State Role in Securing Compliance With the OCR Guidelines 43

A. Description of the Legal Framework 43

B. Analysis of the Legal Framework 52

CHAPTER 7

COMPLIANCE WITH THE CIVIL RIGHTS LAWS

I. Introduction

A. Purpose and Organization of the Chapter

The Education Amendments of 1976 charged NIE with undertaking a thorough evaluation of vocational education programs, including "an examination of how to achieve compliance with and enforcement of the provisions of applicable laws of the United States." Thus, the Congressional mandate extends beyond a study of the VEA.

The purpose of this chapter is to analyze the adequacy of the legal framework of the major civil rights statutes, regulations, and guidelines applicable to elementary, secondary, and postsecondary recipients of Federal financial assistance, *i.e.*, Title VI of the Civil Rights Act of 1964 (Title VI), Title IX of the Education Amendments of 1972 (Title IX), and Section 504 of the Rehabilitation Act of 1973 (Section 504). This chapter does *not* analyze the nature and extent of the commitment by ED and states to implement these civil rights statutes.

This chapter is divided into six sections. The first section sets out the project's major findings, conclusions, and recommendations. The second section contains an overview of the applicable Federal civil rights laws, regulations, and guidelines, and the relationship between these laws and the VEA. The third section describes the statistics and OCR findings indicating possible problems of discrimination in vocational education. The fourth section analyzes the standards set out in OCR guidelines for determining whether a recipient has engaged in discrimination. The fifth section describes the Federal role in securing compliance with the civil rights statutes, regulations, and guidelines. The final section analyzes the states role in overseeing the nondiscriminatory operation of vocational education programs by local recipients of Federal assistance.

B. Overview of the Major Findings, Conclusions, and Recommendations

Our study focused on the clarity, consistency, and comprehensiveness of the Vocational Education Guidelines issued by OCR (OCR Guidelines). The study focused on two aspects of the OCR Guidelines -- the relationship between the Guidelines and the VEA, and the Guidelines themselves.

With respect to the first issue, we found that many persons did not fully grasp the relationship between the OCR Guidelines and the VEA. The OCR Guidelines contain the standards for ensuring equal opportunity, i.e., civil rights which may not be abridged by recipients, regardless of costs. One of the primary objectives of the VEA is to provide financial assistance to help recipients meet their civil rights obligations. In other words, VEA funds may be used to relieve the financial strains placed on recipients resulting from the extra costs sometimes associated with ensuring equal and effective opportunity. If a recipient chooses not to apply for set-aside funds for the handicapped but receives other Federal assistance, it still must ensure equal opportunity for all students, including handicapped students, and pay for the costs associated with such an obligation from other available sources.

The OCR Guidelines place a heavy emphasis on statistics either to identify potential problems requiring further inquiry or to establish presumptions of discrimination which may be rebutted by recipients. Under the OCR Guidelines presumptions of discrimination are established where statistics demonstrate "disproportionate adverse effect", "disproportionate exclusion", "predominant enrollment" and "attendance primarily by members of the protected class." These standards are not sufficiently clear to ensure uniformity of interpretation as to whether a particular imbalance creates a presumption of discrimination.

We recommend that OCR establish objective "rules-of-thumb" for purposes of establishing presumptions of discrimination which rely on statistics. Furthermore, OCR should clarify when statistics indicate that further inquiry must be undertaken (without necessarily establishing a presumption of discrimination) and when statistics establish a presumption of discrimination. Given this substantial reliance on statistics, it is essential that whatever changes are made to the VEA recordkeeping and reporting requirement, the revised Act continue to require adequate documentation to enable a state agency or OCR to determine compliance with the OCR Guidelines.

The state personnel interviewed were uncertain as to what facts would constitute an acceptable rebuttal. One state person explained, "we'll figure it out when we face it." Other than the four examples accompanying the OCR Guidelines, OCR has provided no further clarification.

The question of what constitutes an acceptable rebuttal is the essence of the entire Guidelines. Absent clear direction from OCR, a state not interested in securing compliance could accept any justification as an acceptable rebuttal, thereby thwarting the objective of the Guidelines. In contrast, a second state could refuse to accept any justification, however legitimate. Finally, two different reviewers in the same state could adopt inconsistent interpretations given the same set of facts.

We recommend that OCR provide further policy guidance regarding what it will consider acceptable rebuttals.

The OCR Guidelines provide, in part, that states must adopt "methods of administration" for overseeing compliance by local recipients. OCR drafted a memorandum explaining the nature and extent of this obligation. The memorandum prepared by OCR explaining how to complete the states "methods of administration" is a clear and comprehensive statement of expectations. OCR should be commended for its work. The states included in our study had little, if any, difficulty understanding and responding to the directive. In short, the memorandum requires the creation of a sensible, clear, and comprehensive management system for accomplishing a specific objective.

The major question raised by this provision concerns the adequacy of the standards for determining discrimination, which was the subject of the previous section in this chapter. A management system must have a clearly defined objective. The ultimate objective of the OCR Guidelines is to identify and effect the elimination of discrimination. If the standards for determining discrimination are not sufficiently clear, than no matter how well-defined the management tasks, ultimately the system will not succeed. Given the commitment of time and money expected of states, OCR has an obligation to clearly articulate the standards it expects to use for determining whether a recipient is engaging in discrimination; otherwise the management structure established by the MOA will ultimately fail.

II. Overview of the Applicable Federal Civil Rights Laws and Regulations, OCR Guidelines and Their Relationship to the VEA

A. Civil Rights Laws and Regulations

Congress has enacted four laws prohibiting discrimination by recipients of Federal financial assistance. Title VI of the Civil Rights Act of 1964 prohibits discrimination on the basis of race, color and national origin (Title VI).[1] Title IX of the Education Amendments of 1972 prohibits discrimination on the basis of sex by educational institutions receiving Federal financial assistance (Title IX.)[2] Section 504 of the Rehabilitation Act of 1973 prohibits discrimination by recipients on the basis of handicap (Section 504).[3] The Age Discrimination Act of 1975 prohibits discrimination on the basis of age.[4]

This subsection of the paper describes Title VI, Title IX, and Section 504.

Title VI of the Civil Rights Act of 1964 prohibits discrimination on the basis of race, color, or national origin in programs or activities receiving Federal financial assistance. The Title VI regulations define in general terms the discriminatory acts which are prohibited, including specific examples of illegal activities.

---

[1] 42 U.S.C. 2000d - 2000d - 4; 34 C.F.R. Part 100.

[2] 20 U.S.C. 1681, 1682; 34 C.F.R. Part 106.

[3] 29 U.S.C. 794; 34 C.F.R. Part 104.

[4] Section 303; 42 U.S.C. 6101; 45 C.F.R. Part 90 (Jurisdiction over the Age Discrimination Act is still undecided).

For example, Title VI (as interpreted by the U.S. Supreme Court in Lau vs. Nichols) requires that limited-English-proficient students be provided an educational opportunity that is equal to and as effective as that provided to English-proficient students. In Lau vs. Nichols, the Supreme Court found that "there is no equality of treatment merely by providing students with the same facilities, textbooks, teachers, and curriculum, for students who do not understand English are effectively foreclosed from any meaningful education."

The Title VI regulations also require that recipient agencies describe their methods of Title VI administration and enforcement to OCR. Finally, the regulations prescribe enforcement and hearing procedures, including compliance reviews, complaint investigation, hearings, judicial review, and post-termination proceedings.

Section 504 of the Rehabilitation Act of 1973 is a civil rights statute which prohibits discrimination on the basis of handicap in any program or activity receiving Federal financial assistance. Subpart A of the regulations prescribes procedural requirements which recipients must satisfy, including self-evaluation, designation of responsible employee, grievance procedures, assurance of compliance, and notice of nondiscrimination. Subpart A also provides that state agencies must oversee the operation of programs by subrecipients to ensure that Federal funds are not used in a discriminatory manner. Subpart B of the regulations prohibits discrimination in employment, and Subpart C requires that programs be made physically accessible. Subpart F incorporates by reference the Title VI enforcement procedures.

Subpart D of the regulations specifically applies to programs in elementary and secondary education. The regulatory requirements generally conform to the standards established under P.L. 94-142 [5] are less detailed in certain areas Like P.L. 94-142, the Section 504 regulations require that handicapped persons, regardless of the nature or severity of their handicap, be provided a free appropriate education. School districts must identify and locate all unserved handicapped children, and handicapped students must be educated with nonhandicapped students to the maximum extent appropriate to their needs. School districts are also required to provide parents with due process safeguards regarding the evaluation and placement of their children.

In several instances, the Section 504 regulations specifically reference requirements which may be met by complying with a requirement under P.L. 94-142. For example, §104.33(b)(2), dealing with appropriate education, states that implementation of an IEP as required under P.L. 94-142 is one means of meeting that Section 504 requirement.

Failure to comply with Section 504 can ultimately result in termination of all Federal funds, not simply funds for the handicapped. A proceeding by ED would result in termination of all funds provided by that agency.

Title IX of the Education Amendments of 1972 prohibits discrimination on the basis of sex in education programs receiving Federal financial assistance. The Title IX regulations are divided into six subparts. Subpart A contains the procedural requirements recipients must satisfy, including the self-evaluation process, assurances, grievance mechanisms, and policy dissemination responsibilities of recipients. Subpart B prescribes the coverage of the regulations, including institutions specifically excluded from coverage or partially covered. It also outlines eligibility for, and requirements of, transition plans.

---

[5] P.L. 94-142 is, like the VEA, a grant-in-aid rather than a civil rights statute . It provides financial assistance to and prescribes, in detail the standards for public elementary and secondary education for handicapped children. Part B of EHA, 20 U.S.C. §1401 (as amended by P.L. No. 94-142).

Subpart C defines the discrimination in admissions and recruitment that is prohibited by the law and lists specific prohibitions such as ranking applicants by sex, using quotas, utilizing tests with disproportionate effects that have no predictive validity, using marital or parental status in a discriminatory manner, discriminating on the basis of pregnancy, child-birth, or related conditions, and preadmission inquiry based on marital status.

Subpart D prohibits discrimination based on sex in any academic, extracurricular, research, occupational training, or other educational program or activity operated by a covered Federal funds recipient. It includes coverage of housing, curriculum, counseling, financial aid, and athletics. It also addresses employment assistance, health and insurance benefits and services, as well as pregnancy and marital status, which may not be used as a basis for differing treatment of students according to sex.

Subpart E defines discrimination with respect to employment decisions. Subpart F incorporates by reference the enforcement provisions of Title VI.

B. OCR Guidelines

On March 21, 1979, the Department of HEW published in the Federal Register guidelines explaining the civil rights responsibilities of recipients of Federal funds offering or administering vocational education programs (OCR Guidelines).[6]

---

[6] 44 F.R. 17162-17175. These guidelines were issued as a result of injunctive orders entered by a federal district court in Adams vs. Califano and because the Department found evidence of continuing discrimination in vocational education programs. 44 F.R. 17162 (March 21, 1979).

The Guidelines are generally derived from the requirements set out in the Title VI, Title IX, and Section 504 statutes and implementing regulations.[7] In addition, certain components of the Guidelines (e.g., allocation of VEA funds) derive in part from the regulations implementing the VEA.[8] The Vocational Education Guidelines have been reviewed by OVAE and found consistent with its policies.[9]

1. Scope of the Guidelines

The Vocational Education Guidelines are applicable to recipients of financial assistance from ED that offer or perform administrative oversight responsibilities with respect to programs of vocational education and training.[10] This includes state agency recipients.[11] The Guidelines are not limited to recipients receiving assistance under the VEA.

---

[7] 44 F.R. 17163 (March 21, 1979).

[8] Id.

[9] Id.

[10] 44 F.R. 17164 (March 21, 1979).

[11] Id.

2. Guidelines Pertaining to the Performance of Oversight Responsibilities by State Agencies

The Guidelines provide that the state agencies responsible for the administration of vocational education programs must adopt a compliance program to prevent, identify, and remedy discrimination by its subrecipients.[12] The compliance program must include:

(1) Collecting and analyzing civil rights related data compiled by subrecipients;

(2) Conducting periodic compliance reviews of selected subrecipients;

(3) Providing technical assistance upon request to subrecipients; and

(4) Periodically reporting its activities and findings to OCR.[13]

State agencies are not required to terminate or defer assistance to any subrecipient, nor are they required to conduct hearings.[14]

By March 21, 1980, each state agency recipient performing oversight responsibilities was required to submit to OCR the methods of administration (MOA) it will follow in carrying out its compliance responsibilities.[15] ED will review each submission and then either approve it or return it to the state officials for revision. Each state is also required to submit an annual compliance report.

3. Guidelines Pertaining to Funds Distribution

The Guidelines explain, among other things, that recipients may not adopt a formula or other method for the allocation of Federal state, or local vocational education funds that has the effect of discriminating on the basis of race, color, national origin, sex, or handicap.[16] However, recipients may use such factors if they are included to compensate for past discrimination or to comply with the provisions of the VEA designed to assist specified protected groups.

---

[12] 44 F.R. 17165 (March 21, 1979).

[13] *Id.*

[14] *Id.*

[15] In July 1979, OCR issued a memorandum to state agency recipients which described in greater detail the criteria it would use in reviewing methods of administration plans submitted by the state agencies.

4. Guidelines Pertaining to the Adoption of Admissions Criteria, the Approval of Applications, and Employment

State agency recipients may not engage in discrimination in performing the following activities:[17]

(1) Establishment of requirements for admission to or requirements for the administration of vocational education programs;

(2) Approval of action by local recipients providing vocational education. For example, a state agency must ensure compliance with the guidelines when it reviews a local recipient's decision to create or change a geographic service area; and

(3) Employment (particularly of handicapped persons).

---

[16] Id.

[17] 44 F.R. 17165 (March 21, 1979).

5. Guidelines Pertaining to the Operation of Programs

a. Overview of major decisions -- Recipients operating vocational education programs routinely adopt policies and procedures and perform numerous duties affecting the delivery of vocational education services to students. The Guidelines identify the major decisions made by recipients applicable to the operation of vocational education programs and then state that each decision must be made in a non-discriminatory fashion.[18] The major areas of decision include:

- Work study, cooperative vocational education, and apprenticeship programs;
- Admissions criteria (residency requirements, numerical limitations by sending schools, vocational education centers, branches and annexes, course prerequisites, and limited-English-proficient students);
- Site selection;
- Additions and renovations to existing facilities;
- Architectural barriers;
- Public notification;
- Counseling;
- Recruitment;
- Financial assistance; and
- Housing.

---

[18] 44 F.R. 17165-17168 (March 21, 1979).

b. Decisions particularly overlapping VEA provisions -- The Guidelines pertaining to the operation of work study, cooperative vocational education, and apprenticeship programs are described below because of their particular relevance to the VEA.[19]

The Guidelines generally state that recipients may not make decisions concerning the operation of the programs listed in the previous sentence that have the effect of subjecting persons to discrimination on the bases of race, color, national origin, sex, or handicap. In addition, the Guidelines repeat a key provision in the regulations implementing Title VI, Title IX, and Section 504 -- namely recipients may not enter into contracts, agreements, or other arrangements that have discriminatory effects. For example, recipients must ensure that students participating in work study or cooperative vocational education programs are not discriminated against by employers or prospective employers. If the recipient enters into a written agreement for the referral or assignment of students to the employer, the agreement must contain an assurance from the employer that students will be accepted and assigned to jobs and otherwise treated in a nondiscriminatory fashion. If a recipient discovers that an employer is engaging in discrimination, it must require that the employer cease its discriminatory actions or terminate its relationship.

---

[19] 44 F.R. 17167 (March 21, 1979).

C. Relationship Between Civil Rights Laws, OCR Guidelines, and the VEA

The previous discussion described the laws and guidelines ensuring equal opportunity for all students. In all cases, the opportunity provided must be "effective" in order for it to be considered "equal". Effective opportunity may entail the provision of special services that are different from and in some cases more expensive than services provided to others. For example, it would not be considered equal opportunity for a school district to admit a deaf child to a class but not provide him/her with effective means, e.g., an interpreter for the child to understand the teacher or receive instruction.

Because the receipt of effective opportunity is a basic civil right, recipients must provide all necessary services, regardless of the costs.

One of the primary objectives of the VEA is to provide financial assistance to help recipients meet their civil rights obligations. In short, VEA funds may be used to relieve the financial strains placed on recipients resulting from the extra costs associated with ensuring equal and effective opportunity for children protected by the civil rights statutes. If a recipient chooses not to accept VEA funds or the amount of funds received is inadequate to meet its civil rights obligations, the recipient is not excused from compliance, i.e., the obligations apply irrespective of the amount of Federal or state funds budgeted.

III. Factual Bases for the Guidelines - Possible Problems of Discrimination in Vocational Education

A. Introduction

The Preamble to the OCR Vocational Education Guidelines explains that "the guidelines are adopted because it is apparent that many vocational education administrators engage in unlawfully discriminatory practices. They need additional guidance and support from the Department to meet their obligations under civil rights authorities."[20] This section describes some of the possible problems of discrimination identified in OCR surveys in the mid and late 1970's.

B. Civil Rights Issues Between 1974-1977

In October of 1977, the Office for Civil Rights prepared a paper for the Intra-Departmental Task Force On Civil Rights concerning civil rights issues in vocational education. The following discussion summarizes OCR's findings.

First, OCR identified the following major civil rights issues in vocational education.

1. **Lack of Accessibility of the Vocational Education Training Sites**

   The largest number of minorities (ethnic and cultural) are located in the large cities; however, as of 1972-73, only 16% of the vocational schools were located in the large cities. Many vocational programs leading to the higher-paying technical jobs are located only in the white majority counties outside of the city. Limited transportation facilities further decrease the mobility of minorities. Site location is also important because applicants have been refused admission if they live outside of the service area.
   In the state of Massachusetts, for example, the Regional Vocational High School System appears to offer a superior type of vocational education, yet not one of

---

[20] 44 F.R. 17162 (March 21, 1979).

these schools is located in an area with high minority populations. The locations of these schools are white enclaves of Massachusetts.

2. Unequal Distribution of Monetary Resources

Most large cities have not been able to raise sufficient money to offer vocational technical education to the large number of young people, minorities, and disadvantaged needing the training. This has resulted in the lack of equal educational opportunity particularly in programs geared to areas serving minority and disadvantaged persons.
As a result of our 1974 survey, we found in the State of Massachusetts, well-documented information that differences exist between the Regional Vocational Technical Schools (RVTS) serving majority white suburban clientele and the AVES serving the inner city minority population. The physical plants of the RVTS are so superior to the AVES that comparison is not possible.

3. Faculty and Administrative Assignments

Minority women and men are poorly represented in faculty and administrative positions; in addition, they are disproportionately assigned to classes with predominantly minority and female enrollments. As of 1972, minorities also received less salary than their white counterparts. Further, in requiring educational qualifications not directly related to competence in vocational teaching, vocational schools reject a disproportionate number of minority applicants for teaching positions.

Set out below is a summary of the specific compliance problems found under each civil rights authority.

Title VI Compliance Issues

1. Existence of Racially Segregated (Single Race) Vocational Schools and Courses

The 1974 Survey revealed that 9 schools were all black and 10 schools were all white; thus 3% of the schools surveyed were segregated by race. Certain "elite" courses are offered in schools serving only whites. At schools serving whites, such courses as air-conditioning and electronic technology are offered. These courses are not offered in schools in the same state which serve minorities only. Conversely, courses such as masonry, leather work, shoe repair which have been traditionally minority courses are not offered in majority vocational schools.

The majority population is predominately enrolled in regional vocational schools in the suburbs and outlining [SIC] counties. Schools funded by the state offer more diversified course offerings and the higher paying technical vocations not available in the city.

2. Racial Stereotyping

Minorities are channeled into "traditional" courses such as masonry, shoe repair, leather work, which tend to perpetuate racial stereotyping. Over one-half of the black students enrolled in secondary vocational education programs in 1972 were in home economics and secretarial-clerical courses; 22% were training in lower paying trade/industrial occupation; 11% were involved in agriculture related training. Only 3% of the black students enrolled in vocational courses are being trained for higher paying positions in health and technical occupations. Secondly, there are few chances for professional growth and advancement in the traditional minority occupations. Since minorities are not entering the non-traditional areas it contributes to the unavailability of minorities for faculty and administrative positions.

3. Underutilization of Minorities in Administrative and Faculty Positions

Minorities are poorly represented in administrative and faculty positions. If employed, they are disproportionately assigned to predominately minority classes and in menial positions as janitors and laborers.

Minority vocational education instructors are not represented in schools in proportion to the minority population; i.e., in 1972, black vocational education instructors represented 8% of all vocational education instructors and black students represented 18% of the enrollment of all vocational education courses.

4. Leasing of Space

Vocational Education recipients lease classroom space and/or equipment to labor unions which conduct apprentice training programs in the school's facilities for students of a single race.

Title IX Compliance Issues

1. Existence of Sex Segregated (Single Sex) Schools and Courses

OCR's survey of AVES' involving 1400 vocational schools revealed the following information:

21 schools were exclusively all male or female (three still exist today); 70 schools enrolled more than 90% of one sex; over 1,000 schools (72% of those surveyed) offered 500 or more vocational courses attended solely by persons of one sex.

2. Sexual Stereotyping

Women are channeled into "traditional" courses such as secretarial, homemaking and health which tend to perpetuate sexual stereotypes. Only 8% of all women enrolled in vocational courses are being trained for higher-paying occupations. In a typical breakdown of data, women are distributed as follows:

Health	96%
Home Economics	88%
Business/Office	80%
Marketing	44%
Agriculture	24%
Trade/Industrial	6%
Apprenticeships	9%

Even within the major field, women are concentrated in traditional areas. For example, in Marketing, women are clustered in Food Services and Distributive Education. In the Trade/Industrial classification, women are concentrated in Commercial Art, Cosmetology and Quantity Food.

3. Counseling

Interviews conducted by OCR during investigation with staff and administrative personnel at vocational education facilities strongly suggest that there has been little change in the vocational education patterns for women.

Section 504 Compliance Issues

1. low enrollment of handicapped persons in vocational education programs;
2. reluctance of vocational instructors to accept handicapped students in regular classroom settings even in cases where special changes or modification [SIC] not needed;

3. inexperience of instructors in teaching the handicapped;
4. resistance of employers to hire handicapped individuals;
5. two-thirds of the handicapped students enrolled in set-aside vocational programs are in nonskills training, that is, training not intended to prepare students to compete in the open labor market in any skill, craft or trade. The programs include non-gainful home economics, industrial arts, tutoring, and sheltered workshops.

C. Civil Rights Issues Between 1977 - 1980

In 1979, the Office for Civil Rights undertook a survey of public institutions offering vocational programs to comply with the consent order in the case of Adams vs. Califano. The words of the consent order are: "During the Fall of 1979, defendants shall complete a survey of enrollment and other data adequate to determine which vocational schools and vocational programs over which defendants have jurisdiction for purposes of enforcing Title VI, Title IX and Section 504 are in possible violation of the statute."

The survey was designed primarily as a means of identifying possible violations in all types of public education institutions offering at least one vocational program leading to employment. Generally, these are comprehensive high schools with a vocational curriculum; postsecondary; and junior and community colleges with a vocational curriculum. In these schools, possible violations were identified by examining disproportions in enrollment in the school itself, and in the programs it offers. Programs with an underrepresentation of

Native Americans, Asians, blacks, Hispanics, women, limited-English-speaking persons and handicapped persons were suspect. Schools with too many such programs were investigated.

Summarized into one paragraph, the 1979 vocational education survey shows that the possibility of discrimination is most evident in the continuing underrepresentation of women in agricultural, technical and trade/industrial programs, and the overrepresentation in home economics, health and office programs. The representation of minorities in occupational programs approximates minority representation in all education programs, but the representation of persons with limited proficiency in English and handicapped persons is seriously below national norms. Of the three types of schools, possible issues of noncompliance are most prevalent in area vocational centers; the major vocational program most likely to be discriminatory by race, sex, English proficiency and handicap is apprenticeship training.

Findings in All Types of Vocational Schools and Programs

- Underrepresentation of women is continuing in agricultural, technical and trade/industrial programs, but there are indications of improvement. In 1976, the percentage of women in vocational agriculture was 11.3 percent, in 1977 it was 14.8 percent and in 1979, it was 21.2 percent. In technical programs, in 1976 it was 11.3 percent; in 1977, 17.0 percent, and in 1979, 18.7 percent. In trade and industrial programs, in 1976, it was 12.7 percent; in 1977, 14.4 percent and in 1979, 17.5 percent.

- Male enrollment in traditionally female programs shows only a slight reverse. In 1976, male enrollment in home economics was 15.3 percent; in 1977, 16.1 percent and in 1979, 18.3 percent. In office practices programs, in 1976, it was 24.9 percent; in 1977, 24.9 percent and in 1979, it was 26.4 percent. Male enrollment in health occupations have dropped; in 1976 and 1977, males accounted for 21.2 percent of enrollment; in 1979, that figure fell to 14.8 percent.

- Representation of blacks in vocational education programs nationally is slightly above representation in all public education programs. That is, 14.7 percent of vocational education enrollment is black, while the overall black enrollment is 14.4 percent. For other minorities, comparisons show vocational education enrollments to be slightly below overall enrollments: Native Americans, 0.8 percent in vocational education, 0.9 percent overall; Asians, 1.6 percent in vocational education, 1.9 percent overall; Hispanics, 5.9 percent in vocational education, 6.1 percent overall.

- The highest proportion of blacks is in home economics (22.2%). Lowest proportions of blacks are in agriculture (10.4%) and technical programs (11.0%). Black females are disproportionately enrolled in home economics, accounting for 21.5 percent of female enrollment.

- Lowest representation of blacks in a major vocational education program is in apprentice training (9.2%). Technical courses in apprentice training have lowest black representation (3.4%).

- Black representation on vocational education faculties is disproportionately low (8.1%). Highest black faculty representation is in home economics (12.1%); lowest is in technical programs (2.7%). Blacks account for 6.3 percent of supervisory staff.

- Women account for only 8.5 percent of enrollments in apprentice training. Overall female enrollment in vocational education is 50.44 percent.

- Nearly 50 percent of all vocational education programs offered in all schools are either 100 percent male or 100 percent female.

- Percentage of students of limited-English proficiency in public education (K-12) is about 2.5 percent. LEP students in vocational education account for 0.5 percent of total enrollment.

- Percentage of students with identifiable disability (handicap) in public education (K-12) is about 10 percent. Handicapped students in vocational education account for 2.5 percent of total enrollment.

Findings in Vocational Programs of Comprehensive High Schools

- Disproportionate enrollments by sex are more pronounced in comprehensive high schools than in other types of vocational education schools. Females in agriculture account for 17.5 percent (21.2% overall); in technical programs, 16.9 percent (18.7% overall); in trade and industrial, 14.0 percent (17.5% overall). Males in health occupations have a smaller proportion: 12.8 percent in high school, compared to 14.8 percent overall. In office practices, males account for 21.6 percent of the enrollment compared to 26.4 percent overall.

- Occupational preparation programs, usually offered in junior high school grades, show dominance of males in industrial arts (89.5%) and females in occupational home economics (81.3%).

- Apprentice training programs have a 12.4 percent enrollment of blacks and a 15.5% enrollment of women - a better proportion than the overall average.

- Faculty assignments show that females account for 45.1% of the total and that these are concentrated in health occupations (88.8%), occupational home economics (93.7%), consumer and home economics (97.18%), and office practices (72.3%). Females make up only 18.8 percent of vocational education supervisors. Blacks account for 11.13 percent of total faculty, but only 4.7 percent of technical programs and 9.3 percent of all supervisors.

Findings in Vocational Programs in Junior and Community Colleges

- Vocational programs in these schools have the highest proportion of women in agriculture (32.5%), technical (18.8%) and trade/industrial (23.5%) programs.

- Blacks represent 11.3 percent of enrollments, 3 percent less than the 14 percent national percentage.

- Long term adult enrollments are 44.2 percent female and 15.3 percent black.

- Apprentice training programs are 8 percent black and 6.6 percent female.

- Faculty is 63 percent male, 4.7 percent black, and 91.3 percent white. Supervisors are 73 percent male and 91.6 percent white.

- Limited-English-proficiency students enroll about one half of one percent, which is the national average in vocational education programs. But handicapped students account for 1.3 percent of total enrollment which is half the national average of 2.6 percent.

- Apprentice training programs enroll only 6.6 percent females and 8.0 percent blacks. In all 1024 schools, the enrollment of LEP students in apprentice training was a grand total of 167, and of handicapped students, a grand total of 71.

Findings in Vocational Programs in Area Vocational Centers

- Enrollment in area vocational centers is predominately white male. Females account for only 40.2 percent of enrollment, and whites account for 84.0 percent. Blacks make up 10.1 percent. All minorities account for 16 percent minority enrollment in vocational education nationally.

- Females dominate enrollments in distribution (69.8%), home economics (85.2%), and health programs (92.8%).

- Females are underrepresented in technical programs (19.0%) and trade and industrial programs (17.3%).

- Apprentice training enrollments for women and blacks are below the national average. Blacks account for 7.7 percent (compared to 9.2% nationally) and women enroll 3.9 percent (compared to 8.5% nationally).

- LEP students make up 0.41 percent of enrollments (compared to 0.56% nationally).

- Handicapped students represent 4.9% of all enrollments as compared to 2.5% nationally. This is the only category that exceeds the national average.

- There are 389 schools in which all vocational programs are 100 percent male. Of these, 372 are comprehensive high schools, 4 junior/community colleges, and 13 area vocational centers.

- There are 138 vocational schools in which all vocational programs are 100 percent female. Of these, 102 are comprehensive high schools, 32 are junior/community colleges, and 4 area vocational centers.

- There are 80 area vocational centers (out of a total of 1022) which have apprentice training programs that enroll only males (100%).

IV. Standards for Determining Discrimination

A. Identifying a Possible Violation and Establishing Presumptions

1. Description of the Legal Framework

(a) Overview -- Statistical evidence often plays a significant role in civil rights law.[21] The OCR Guidelines use statistics for two distinct purposes. One purpose is to identify a *possible* violation *i.e.*, an area requiring closer scrutiny by the oversight agency. The second purpose is to establish a *presumption of discrimination*. These two distinct uses of statistics are described below.

(b) *Use of statistics to identify areas requiring further inquiry* -- In drafting the Vocational Education Guidelines, OCR was faced with a difficult decision -- should it use statistics to establish a *presumption of discrimination* where vocational education *courses* are imbalanced, absent further information or should such information be used by OCR (and states performing oversight responsibilities) to *identify potential problem areas* which should be subject to additional investigations? Under the first policy alternative, once imbalance is found, the onus is on the recipient to rebut the presumption; whereas under the second policy, the onus is on OCR or the state to determine whether a particular policy is the basis for the imbalance.

---

[21] See *e.g.*, *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971); *Alabama v. United States*, 304 F 2d 583, 586 (5th Cir. 1962), *aff'd per curriam*, 371 U.S. 37 (1962).

The OCR Guidelines explicitly reject the use of statistics to establish a ganeral presumption of discrimination with respect to access to and admission of students to vocational education courses.[22]

Several commenters objected to the section in the proposed guidelines which would have established such a general presumption. These commenters felt that it was unreasonable and unrealistic to presume that segregated courses and programs resulted from recipient practices rather than student choice.[23] OCR accepted this criticism.[24]

> Vocational education administrators are quite correct in arguing that specific vocational courses and programs are generally elected by, not required of, students. Consequently, segregation may result from parental, community and peer group influences that are beyond their control. This fact is generally recognized by Section IV of the Guidelines: each paragraph identifies a method or factor controlling student eligibility other than student choice and attempts to provide protection against the unlawful exclusion of students based upon that factor. Thus, a student's ineligibility based upon residence (paragraph IV-C) or because the facility was located too far from his or her home (paragraph IV-B) or because he or she scored too low on an admissions test (paragraph IV-K) is addressed by the Guidelines. Proposed paragraph IV-H departed from this theme. Rather than identify a specific device that resulted in the exclusion of students despite their desire to enroll, the paragraph proposed a presumption of unlawful discrimination whenever a facility or course was segregated. This was unreasonable, and the general presumption has been deleted.

---

[22] OCR Guidelines at 17172.

[23] *Id.* at 17171.

[24] *Id.* at 17172.

In sum, where statistics demonstrate imbalance in courses or programs, OCR or states must look further to determine whether a "presumption of discrimination" exists; the mere finding of statistical imbalance does not create such a presumption. OCR identifies nine specific categories of policies or practices which may have the effect of producing the imbalance. A presumption of discrimination is established if one of these nine devices has the effect of producing the statistical imbalance.

(c) Use of statistics to establish presumptions of discrimination -- Although OCR has rejected the concept of presuming that there was discrimination in every instance in which a course or program was imbalanced in its enrollment of students from protected classes, in other areas the Guidelines do indicate that the agency will use statistics in coming to the initial conclusion, subject to the state's rebuttal, that discrimination has occurred. In these areas, then, statistics will in effect give rise to a presumption of discrimination. For example, the OCR Guidelines use statistics to establish that a state is distributing VEA or state vocational education funds in a discriminatory fashion. Specifically, the OCR Guidelines explain that in each state it is likely that some local recipients enroll "greater proportions" of minority students in vocational education than the state-wide proportion.

> "A funding formula or other method of allocation that results in such local recipients receiving per pupil allocations of federal or state vocational education funds lower than the state-wide average per pupil allocation will be presumed unlawfully discriminatory." 25/

The rationale for this standard is set out in the "Comments and Responses" section of the Federal Register.

> Section 106(a)(5)(B)(ii) of the Vocational Education Act prohibits the adoption of a formula seeking equal per pupil allocations of funds. Rather, it requires priority funding for subrecipients serving the greatest concentrations of low-income families, for subrecipients least able to pay, and for subrecipients serving the greatest concentrations of students whose education imposes higher than average costs (e.g., handicapped students, students from low-income families, and students from families in which English is not the dominant language). These statutory priorities should result in greater expenditures for communities with concentrations of minority group persons. For this reason the gauge of unlawful discrimination contained in the Guidelines--a finding of lower allocations for communities containing concentrations of minority persons--will generally indicate a high probability of noncompliance.
>
> In addition to an analysis of allocations state-wide, OCR may examine individual districts with substantial numbers of minority students to determine if such districts receive lower per pupil allocations than the state-wide average. 26/

25/ OCR Guidelines at 17165.

26/ Comment 19, 44 F.R. 17170.

Additional examples where the OCR Guidelines use statistics to establish presumptions are described below.

Eligibility for Admission to Secondary Vocational Education Centers Based on Numerical Limits on Sending Schools (p. 17166)

Recipient may not use a system of admissions that limits admission to a fixed number of students for each sending school if such a system disproportionately excludes students from the center.

Eligibility for Admissions to Vocational Education Centers, Branches or Annexes Based Upon Student Option (p. 17166)

A voc. ed. center, branch, or annex open to all students in a service area and predominantly enrolling members of a protected class (other than handicapped students) will be presumed unlawfully segregated if (1) it was established for the protected class or (2) since its construction has been attended primarily by members of the protected class or (3) most of its program offerings have traditionally been selected predominantly by members of the protected class.

Eligibility Based on Evaluation of Each Applicant Under Admissions Criteria (p. 17166)

Recipients may not judge candidates for admission to voc ed programs on the basis of criteria that have the effect of disproportionately excluding persons in a protected class. However, if a recipient can demonstrate that such criteria have been validated as essential to participation in a given program and that alternative equally valid criteria which do not have a disproportionate adverse effect are unavailable, the criteria will be judged nondiscriminatory. (Examples of criteria which must be validated are set out at p. 17166 and p. 17172 (Grade Point Average)).

Counseling (p. 17167)

If a vocational program disproportionately enrolls members of a protected class recipients must take steps to ensure that the disproportion does not result from unlawful discrimination in counseling activities.

2. Analysis of the Legal Framework

Based on the above description, it is apparent that presumptions of discrimination are established where statistics demonstrate "disproportionate adverse effect" "disproportionate exclusion" "predominant enrollment" and attendance "primarily by members of the protected class." The question remains, what do these terms mean? The OCR Guidelines do not clarify these key terms. When we asked the persons responsible for administering the OCR Guidelines within the states included in our study what these words meant, we heard significantly different answers. One person responded that he thought that his state should use the "rule-of-thumb" set out in a Title IX Manual developed in 1975.[27] The Title IX Manual establishes enrollment of 80 percent or more students of one sex as establishing a fact which requires an explanation from the school district. Another person explained that she didn't have the faintest idea what it meant. Although the responses varied from person to person, when asked whether the state had adopted a definitive "rule-of-thumb", all persons responded in the negative.

---

[27] Title IX Policy Manual (DHEW/OCR, September 1975) at 17.

As explained supra, OCR has not adopted official "rules-of-thumb" for determining the existence of, for example, "disproportionate adverse impact." However, OCR's 1979 and 1980 Draft Investigative Manual for determining presumptions of discrimination in vocational education contains objective "rules-of-thumb". The 1980 Manual explains:[28]

> Substantial disproportions in the number of assignments related to training, hours worked, or amount of pay indicates possible discrimination in student placement programs, either within the practices of the recipient or the employer. Substantial disproportions based on race/national origin, sex, and handicap give rise to a presumption that the recipient has not taken steps to ensure that students placed in cooperative education, work study, or job placement programs do not receive unequal treatment on these bases.
>
> For each of the three area categories above, compare minority, female, and handicapped percentages with the total group percentage. As a rule-of-thumb the protected group percentage should not be above 70 or below 30. However, the definition of what is "substantial" must be determined on a case-by-case basis.

A paper prepared by OCR in 1974 entitled, "A Guide To Compliance and Enforcement in Area Vocational Education Schools" uses two separate objective "rules-of-thumb." First, the paper explains that if the deviation between enrollment of minorities in the district and enrollment in a school "is more than 10 percent there may be a problem in admissions policies that could be a violation of Title VI." [29]

---

[28] 1980 Draft Manual at 58.

[29] 1974 Guide at 29.

Second, any area vocational education school with "fewer than 20 percent of one sex should be flagged for eventual inquiry...."[30]

Other Federal agencies responsible for implementing employment discrimination laws have developed an 80 percent "rule-of-thumb."[31]

In sum, the standards currently set out in the OCR Guidelines (*e.g.*, disproportionate adverse impact) are not sufficiently clear to ensure uniformity of interpretation as to whether a particular statistical imbalance creates a presumption of discrimination. Further, a particular objective "rule-of-thumb" with respect to one issue (*e.g.*, funds distribution) may be totally inappropriate for another issue (*e.g.*, admissions criteria). We recommend that the guidelines state more clearly that the ultimate meaning of such terms as "disaproportionate adverse impact" can only be developed through individual application to particular factual settings. We also recommend that OCR "bite the bullet" and establish objective "rules-of-thumb" to be used as general guides for purposes of establishing presumptions of discrimination which rely on statistics.

In addition to the need for clarifying the circumstances under which statistics establish a presumption of discrimination, Congress should ensure that whatever changes are made to the VEA in general and data requirements in particular, the present obligation to collect data necessary to ascertain compliance with Title VI, Title IX, and Section 504 should not be diminished. The rationale for the inclusion of specific provisions requiring the collection of such data is explained in the House Report accompanying the 1976 Amendments:[32]

---

[30] *Id*. at 44.

[31] *See e.g.*, OFCC Testing and Selection Order Guidelines Memorandum No. 8 (July 24, 1974), §3 and §4-D of the "Uniform Guidelines on Employee Selection Procedures", 43 F.R. 38297-98 (August 25, 1978).

> The Committee has required that information on vocational students must be reported in the new national vocational education reporting and accounting system on the basis of their sex and race. The Committee's recent hearings on sex discrimination and sex stereotyping in vocational education pointed out the clear need for such information. These hearings also brought to our attention the fact that the Administration discontinued the collection of such data a short while before the hearings. As a result of those hearings the Administration has reinstituted the collection of such data, but we feel compelled to require its collection in our proposed amendments because we do not want another administrative decision to terminate its collection.

B. Rebutting the Presumption

1. Description of the Legal Framework

Under the OCR Guidelines, once the statistics establish a presumption of discrimination, a recipient is provided the opportunity to rebut the presumption. Four examples of acceptable rebuttals are contained in the comment and response section to the OCR Guidelines.[33]

---

[32] H.R. Rep. No. 94-1085 at 45.

[33] See comment 19 (44 F.R. 17170), comment 32 (44 F.R. 17171), comment 35 (Id.), and comment 39 (44 F.R. 17172).

2. Analysis of the Legal Framework

The state personnel interviewed were uncertain as to what facts would constitute an acceptable rebuttal. One state person explained, "we'll figure it out when we face it." Other than the four examples accompanying the OCR Guidelines, OCR has provided no further clarification.

The question of what constitutes an acceptable rebuttal is the essence of the entire Guidelines. Absent clear direction from OCR, a state not interested in securing compliance could accept any justification as an acceptable rebuttal, thereby thwarting the objective of the Guidelines. In contrast, a second state could refuse to accept any justification, however legitimate. Finally, two different reviewers in the same state could adopt inconsistent interpretations given the same set of facts.

We recommend that OCR disseminate to state agencies and other recipients guidance regarding what it will consider acceptable rebuttals. This guidance should be based on individual decisions and enforcement actions. For example, if OCR draws a presumption of discrimination because a pen-and-pencil test disproportionately excludes minority students from admission to a vocational program in an area voc-tech school serving several districts, at least one of which has a significant minority population, then in accordance with the substantive content of the guidelines it would be an acceptable rebuttal if the school presented the results of a proper validation study which demonstrated that the test accurately measured characteristics which students had to have in order to get through -- participate in, not get an "A" in -- the program.

V. The Federal Role in Securing Compliance With the Civil Rights Statutes and OCR Guidelines

This section focuses on Federal administrative responsibilities for securing compliance with and enforcement of Federal civil rights requirements that apply to recipients of Federal financial assistance operating vocational education programs. The following sections discuss the responsibilities of the Office for Civil Rights in ED, the standards for securing compliance and enforcement, and OCR's methods for securing compliance with and enforcement of civil rights requirements.

A. The Office for Civil Rights

The Office for Civil Rights was established in 1965 to insure that recipients of Federal assistance from HEW complied with Title VI of the Civil Rights Act of 1964, which prohibits discrimination by recipients of Federal assistance on the basis of race, color or national origin. OCR was subsequently given similar enforcement responsibilities for Title IX of the Education Amendments of 1972, which prohibits discrimination in education programs on the basis of sex by recipients of Federal assistance and for Section 504 of the Rehabilitation Act of 1973, as amended, which prohibits discrimination on the basis of handicap by recipients of Federal assistance.

The Department of Education Organization Act (DEOA) establishes an Office for Civil Rights[34] to be administered by an Assistant Secretary for Civil Rights[35] and requires that the Secretary of Education delegate to the Assistant Secretary for Civil Rights the functions administered by OCR in HEW.[36]

B. Standards for Compliance and Enforcement

In developing standards to ensure compliance with and enforcement of applicable civil rights requirements in vocational education, OCR has relied primarily upon Title VI, Title IX, Section 504 and their implementing regulations.[37] As explained above, in order to explain how these civil rights laws and regulations apply to vocational education programs, OCR has issued its "Guidelines for Eliminating Discrimination and Denial of Services on the Basis of Race, Color, National Origin, Sex, and Handicap."[38] The Guidelines "derive from and supplement and must be read in conjunction with civil rights laws and department regulations."[39]

---

[34] Sec. 203(a) of the DEOA (20 U.S.C. 3413(a)).

[35] Id.; Sec. 202(b)(1)(F) of the DEOA (20 U.S.C. 3412(b)(1)(F)).

[36] Sec. 203(a) and 301(a)(3) of the DEOA (20 U.S.C. 3413(a) and 3441(a)(3)).

[37] See 45 C.F.R. Part 80 for the Title VI regulations; 45 C.F.R. Part 86 for the Title IX regulations; and 45 C.F.R. Part 84 for the Section 504 regulations.

C. OCR Methods for Securing Compliance and Enforcement

OCR has the primary responsibility for securing compliance with and enforcement of civil rights requirements in vocational education programs.[40] In addition to the Guidelines, OCR uses several methods to secure compliance with and enforcement of civil rights requirements. These include (1) approval of state agency "methods of administration;" (2) compliance reviews; (3) monitoring; (4) complaint investigation; (5) analysis of enrollment and related data; and (6) proceedings to terminate or withhold funding. Each is described briefly below.

1. Approval of State Agency Methods of Administration

The Guidelines require that the state agency responsible for the administration of vocational education submit to ED

---

[38] 44 F.R. 17162 (March 21, 1979).

[39] 44 F.R. 17163. Section III of the Guidelines, which prohibits discrimination in the allocation of vocational education funds, derives in part from and must be read together with the VEA and its regulations. Id. The Vocational Education Guidelines are discussed supra at page 9.

[40] BOAE must monitor compliance with the VEA and state agencies, must monitor subrecipients for civil rights compliance. However, these functions are not intended to relieve OCR of its primary responsibility. As the preface to the Guidelines indicates, "BOAE and state agencies will engage in activities supplementary to those of [OCR]" and "OCR will lead, assist and monitor BOAE and state agencies in their civil rights activities." 44 F.R. 17163-17164.

"the methods of administration and related procedures" it will use to carry out its civil rights obligations under the Guidelines. The Methods of Administration (MOA) were to have been submitted to BOAE (now OVAE) before March 21, 1980.[41/] OVAE must "review, comment, and recommend approval or disapproval of each state agency's MOA before forwarding it to OCR for a final determination of acceptability."[42/] The OCR MOA Memorandum indicates that, in conjunction with review of the MOA, OVAE and OCR will examine the descriptive material in the state's general application, five-year state plan, annual program plan and annual accountability report.[43/] Final approval of a state agency's MOA rests with OCR.[44/]

2. Compliance Reviews

As a result of court orders in the case in which HEW was successfully sued for failing to enforce civil rights laws, OCR must enforce civil rights requirements in vocational education

---

[41/] OCR Memorandum, "Procedures for Preparing the Methods of Administration Described in the Vocational Education Guidelines" (July 1979) at 1.

[42/] Id.

[43/] Id.

[44/] Id.

programs through compliance reviews[45] which are conducted by OCR investigators.[46] OCR's Proposed Annual Operating Plan for FY 1982 indicates that it plans to assign 14 percent of its investigator time on new compliance reviews, requiring a total of fifty-three investigative years. Four of those investigative years will be for "Vocational Education: Access, Admissions, and Job Placement."

3. Monitoring

The FY 1982 Proposed Annual Operating Plan indicates that OCR regional staff plan to spend 33 investigative years (out of 371) on monitoring activities, including monitoring: (1) the desegregation plans of state systems of higher education; (2) the methods of administration of state vocational education agencies; (3) agreements entered into as a result of previous complaint investigations; and (4) "compliance reviews under all authorities."[47] This 33-person years of investigator time represents less than 10 percent of the investigative staff time.[48] The plan does not indicate how many of the 33-person years will be spent monitoring MOAs.

---

[45] 44 F.R. 17162 (March 21, 1979).

[46] See OCR's Draft "Investigative Manual for Determining Discrimination and Denial of Services on the Basis of Race, Color, National Origin, Sex and Handicap in Vocational Education Programs" (1979).

[47] 46 F.R. 47810 (Sept. 30, 1981).

[48] Id.

4. Complaint Investigation

The FY 1982 Proposed Annual Operating Plan indicates that OCR projects that it will receive 3,592 complaints in FY 1982 and carry over a pending caseload of 1,800 complaints. The Plan projects that 3,592 complaints will be closed during 1982.[49] Based on these projections, OCR has allocated 285 regional investigative years (75% of the regional investigative time) to complaint investigation.[50] The Plan does not contain an estimate of how many of the projected complaints are expected to be vocational education related.

5. Analysis of Enrollment and Related Data

The court order in the suit against HEW directed the Department to enforce civil rights requirements in vocational education by conducting a survey of enrollments and related data.[51] Results from this survey can be used both to identify areas where problems of compliance with civil rights requirements may be present and to suggest possible candidates for future compliance reviews.

---

[49] Id.

[50] Id.

[51] 44 F.R. 17162 (March 21, 1979).

6. Proceedings to Terminate or Withhold Funding

If OCR finds that particular provisions of the Guidelines have been violated, then it will require remedial action.[52] If the noncompliance cannot be corrected by informal means, compliance may be effected by the suspension or termination of or refusal to grant or to continue federal financial assistance or by any other means authorized by law.[53] Before termination or suspension occurs, several procedural requirements must be satisfied.[54]

D. Relationship Between OCR and OVAE

In July, 1980 the Assistant Secretary for Civil Rights and Adult and Vocational Education signed a memorandum of understanding (MOU) in order to implement the OCR Guidelines. The MOU sets out the responsibilities and expectations of both offices with respect to such issues as: (1) procedures for reviewing methods of administration developed by the states; (2) training of OCR and OVAE staff; (3) OCR compliance reviews; (4) MERC/Qs; (5) data coordination, (6) complaint investigation and enforcement; and (7) annual reports from state agencies.

---

[52] 44 F.R. 17165-17168. See, e.g., Section III. F. (alteration of fund distribution to provide equal opportunity); Section IV. E. (remedies for violation of site selection and geographic service area requirements); Section IV. G. (remedies for violation of eligibility based on numerical limits requirements); Section IV. I. (remedies for facility segregation under student option plans); and Section IV. M. (remedial action on behalf of persons with limited-English-language skills).

[53] 45 C.F.R. Part 80 and 81.

[54] Id.

VI. State Role In Securing Compliance With the OCR Guidelines

A. Description of the Legal Framework

The OCR Guidelines provide that the state agencies responsible for the administration of vocational education programs must adopt a *compliance* program to prevent, identify, and remedy discrimination by its subrecipients.[55] The compliance program *must* include:

(1) Collecting and analyzing civil rights related data compiled by subrecipients;

(2) Conducting periodic compliance reviews of selected subrecipients;

(3) Providing technical assistance upon request to subrecipients; and

(4) Periodically reporting its activities and findings to OCR.[56]

State agencies are *not* required to terminate or defer assistance to any subrecipient; nor are they required to conduct hearings.[57]

By March 21, 1980, each state agency recipient performing oversight responsibilities was required to have submitted to OCR the *methods of administration* it will follow in carrying out its compliance responsibilities. In July, 1979, OCR issued a memorandum to state agency recipients which described in greater detail the criteria it would use in reviewing methods of administration plans submitted by the state agencies. In addition, states are required to submit an annual compliance report.

---

[55] 44 F.R. 17165 (March 21, 1979).

[56] *Id.*

[57] *Id.*

Set out below is a more detailed description of the prescribed contents of the MOA. 58/

1.1 Describe the process by which the MOA was developed.

1.1.1 Name the agency/agencies that was/were involved in the MOA development. Include the following:

a. The agency principally responsible for development, or lead agency.

b. Other agencies, if any, participating in the development.

c. Advisory groups, if any, participating in the development.

1.1.2 Describe the roles and responsibilities (extent of involvement) of all agencies involved in the development process.

1.2 Describe the process by which the MOA was reviewed.

1.2.1 Name the officials, by title, who were involved in the review of the MOA.

1.2.2 Describe briefly the review process.

1.3 Describe the process by which the MOA was approved.

1.3.1 Name the officials, by title, who were involved in the approval of the MOA.

1.3.2 Describe briefly the approval process.

58/ The description that follows is quoted from a technical assistance document entitled, "Project MOA - Development of Methods of Administration for the Implementation of OCR Guidelines" prepared by CRC Education and Human Development, Inc. (June 30, 1980).

PART TWO: ORGANIZATION TO MEET CIVIL RIGHTS RESPONSIBILITIES

2.1 Describe the organization and administrative structure of the state agency's civil rights compliance program.

2.1.1 Name the administrative entity that will direct the activities of the civil rights compliance program.

2.1.2 Designate the official position of the person directing the activities of the civil rights compliance program.

2.1.3 Describe the line of authority from the director of the program to the director of the state agency.

2.1.4 Describe the administrative structure developed to:

a. Review state policies and procedures and state-operated programs.

b. Administer the civil rights compliance program relative to subrecipients.

c. Provide technical assistance.

2.2 Name the personnel assigned to implement the civil rights compliance program.

2.2.1 Give the name, title, office, address, and telephone number of each person assigned to carry out the civil rights compliance program.

PART THREE: REVIEW OF STATE POLICIES AND PROGRAMS

3.1 Review of State Policies and Procedures

3.1.1 List the policies and procedures to be reviewed in each of the following areas:

a. Policies and procedures adopted by the state agency that involve the operation of subrecipients' programs.

(1) The establishment of criteria or formulas for distribution of federal or state funds to vocational education programs in the state.

(2) The establishment of requirements for admission to or for the administration of vocational education programs.

(3) The approval of action by local entities providing vocational education.

b. Policies and procedures that involve the internal operations of the state agency.

3.1.2 Describe the methods to be used in carrying out the review.

a. The review of state policies and procedures must be based on relevant provisions of the Guidelines.

b. The methods must provide for meeting the state's continuing obligation to review new or altered policies and procedures, as well as current ones.

3.1.3 Identify the office responsible for the review.

3.1.4 Provide a schedule for the review.

The initial review must be completed by July 1, 1980. The results must be submitted in the annual report, which is due July 1, 1980.

3.2 Review of State Programs

3.2.1 Provide a list of programs to be reviewed.

3.2.2 Describe the methods to be used in carrying out the review.

3.2.3 Provide a schedule for the review.

PART FOUR: ENSURING COMPLIANCE BY SUBRECIPIENTS

4.1 Agency-level Reviews

4.1.1 Describe the methods to be used in selecting subrecipients for agency-level review.

> The method chosen must result in an agency-level review of at least 20 percent of all subrecipients, *per year.* It must also be designed to reach, at the earliest possible date, those subrecipients most likely to have compliance problems.

4.1.2 Describe the procedures to be followed in notifying subrecipients of a pending agency-level review.

> Each subrecipient must receive notification at least 30 days prior to the start of the review. The notification should include information on how the agency-level review will be conducted, should ask for the recipient's cooperation, and should request additional information where necessary.

4.1.3 Specify the data and documents, i.e., the source materials, to be reviewed.

> VEDS must be listed as one source that will be used in the agency-level review.

4.1.4 Describe the methods to be used in analyzing the data, including the kinds of information to be drawn from the source materials as indicators of possible non-compliance.

4.1.5 Provide a schedule for each step of the review.

4.2 On-site Reviews

4.2.1 Describe the methods to be used in selecting subrecipients for the on-site review.

> At a minimum, 25 percent of those subrecipients reviewed at the agency level must also be reviewed at the on-site level every year.
>
> All subrecipients found to have possible compliance problems as a result of the agency-level review must be scheduled for on-site reviews. If the number of subrecipients thus selected does not equal 25 percent of those reviewed at the agency level, the balance must be made up of randomly selected subrecipients from the pool of those reviewed at the agency level in that year.

4.2.2 Describe the procedures to be followed in notifying subrecipients of:

a. The results of the agency-level review.

b. A pending on-site review for subrecipients who have been so selected.

Subrecipients selected for on-site review must be notified at least 30 days prior to the start of the review.

4.2.3 Describe the general areas of inquiry to be pursued in conducting the on site reviews.

On-site reviews must provide for: (1) a determination whether the possible problems identified during the agency-level review are the result of unlawful discrimination; (2) a verification that the findings of compliance made during the agency-level review are accurate; and (3) a review of additional areas that were not examined during the agency-level review.

4.2.4 Describe the methods to be used in analyzing the data from an on-site review.

4.2.5 Describe the procedures to be followed in notifying subrecipients of a completed review.

At the conclusion of the on-site review, each subrecipient reviewed must be notified either:

(1) that no violations have been found (with a reminder of the subrecipient's continuing civil rights obligations and a statement to the effect that OCR may still wish to review the subrecipient); or

(2) that violations have been found and the subrecipient will be given an opportunity to discuss the violations with the state agency and to submit a plan to remedy the violations voluntarily.

A copy of the notification must be submitted to the appropriate regional OCR office.

4.2.6 Provide a schedule for each step of the review.

4.3 Voluntary Compliance Plans for Subrecipients

4.3.1 Describe the procedures the state agency will follow in helping a subrecipient to come into compliance. The description must address:

a. The means by which an opportunity will be provided for the subrecipient to discuss the violations with the state agency.

b. The name of the state agency official who will participate in these discussions.

c. The degree of formality of these discussions.

d. The timing and location of the negotiations.

e. The means by which the state agency will monitor compliance in the future, to ensure that violations do not recur.

4.3.2 Outline the components of the compliance plan.

4.3.3 Provide a time frame for subrecipients to submit compliance plans.

The compliance plan must be submitted to the state agency no later than 90 days after the state agency issues the notification of findings of non-compliance.

4.3.4 Provide a statement regarding the state's responsibility to report findings of non-compliance to OCR.

The state agency must notify the appropriate regional OCR office in the following circumstances:

(1) If the subrecipient fails to take corrective action to remedy violations found during the on-site review, the state agency must notify OCR as soon as it determines that it cannot secure voluntary compliance, but no later than 90 days after the state agency issues the notification of findings of non-compliance.

(2) If a subrecipient submits a plan that is inadequate, but is working in good faith to remedy the plan's deficiencies, the state agency must notify OCR no later than 120 days after the state agency issues the notification of findings of non-compliance.

4.4 Technical Assistance

4.4.1 Describe the types of assistance that will be available upon request to subrecipients.

4.4.2 Describe the procedures to be followed in notifying subrecipients of the availablility of technical assistance, including the frequency of that notification.

4.4.3 Designate the number of people who will be assigned to technical assistance activities, and whether this will be their sole responsibility or they will also be involved in review activities.

PART FIVE: REPORTING TO THE DEPARTMENT

5.1 Describe the format and content areas of the annual civil rights compliance report, including the following sections:

a. *Compliance Organization and Staff.* Report modifications to Part Two of the MOA regarding staff authority, structure, and personnel.

b. *State Policy Review.* Report findings of the state policy review and a description of the action taken by the state agency to amend and correct any policies and procedures found to have a discriminatory effect in the four areas cited in Section II(A) of the Guidelines.

c. *Review of State-Operated Institutions and Programs.* Report findings of the review of state-operated institutions and programs and a description of the action taken by the state agency to correct any problems identified.

d. *Subrecipients Receiving Agency-Level Reviews.* List each subrecipient receiving an agency-level review. List any changes in the procedures, data sources, or analysis plan described in the MOA.

e. *Identification of Subrecipients for On-Site Reviews.* List each subrecipient receiving an on-site review and include a summary of the findings. The findings should include a copy of each voluntary compliance plan entered into with a subrecipient.

f. *Technical Assistance Provided.* List each subrecipient requesting technical assistance, with a summary of the technical assistance provided.

g. *Subrecipients Referred to OCR.* List each subrecipient found to be in non-compliance and referred to OCR as a result of failing to take measures to achieve voluntary compliance.

h. *Monitoring Activities.* Indicate what monitoring activities the state agency has performed during the year to ensure that corrective action has been taken by subrecipients found to be in non-compliance.

5.2 Provide assurances that the report will be submitted to BOAE each July 1st, beginning in 1980.

B. Analysis of the Legal Framework

The memorandum prepared by OCR explaining how to complete the states "methods of administration" is a clear and comprehensive statement of expectations. OCR should be commended for its work. The states included in our study had little, if any, difficulty understanding and responding to the directive. In short, the memorandum requires the creation of a sensible, clear, and comprehensive management system for accomplishing a specific objective.

The major question raised by this provision concerns the adequacy of the standards for determining discrimination, which was the subject of the previous section in this chapter. A management system must have a clearly defined objective. The ultimate objective of the OCR Guidelines is to identify and effect the elimination of discrimination. If the standards for determining discrimination are not sufficiently clear, than no matter how well-defined the management tasks, ultimately the system will not succeed. Given the commitment of time and money expected of states, OCR has an obligation to clearly articulate the standards it expects to use for determining whether a recipient is engaging in discrimination; otherwise the management structure established by the MOA will ultimately fail.

CHAPTER 8

VEA ASSISTANCE FOR SPECIAL NEEDS POPULATIONS

CHAPTER 8

VEA ASSISTANCE FOR SPECIAL NEEDS POPULATIONS

Page

I. Introduction and Overview 1

A. Purpose and Organization of the Chapter 1

B. Overview of the Major Findings, Conclusions, and Recommendations 2

1. Legislative History 2

2. Summary of Findings and Conclusions Regarding the Present Approach for Providing Assistance to Special Needs Populations 4

3. Summary of Findings and Conclusions Regarding Specific Provisions in the Existing VEA 5

II. The Minimum Percentage Requirements 16

A. Description of the Legal Framework 16

1. Overview 16

2. Set-Aside for Handicapped Students 17

3. Minimum Percentages for Disadvantaged and Limited-English-Speaking Ability Persons and for Stipends 18

B. Analysis of the Set-Asides for the Disadvantaged and Handicapped 20

1. Introduction 20

2. Retention and Amount of the Set-Aside 20

3. Separate vs. Single Set-Aside 22

4. Exemption from Set-Aside for Handicapped Students. 23

III. The Matching Requirements for the Set-Asides 25

A. Description of the Legal Framework 25

1. General Standards Applicable to all Matching Provisions in the VEA 25

2. Matching Standards Applicable to the Set-Asides... 26

Page

B. Analysis of the VEA Matching Provision for Set-Asides 30

IV. The Excess Costs Provision 35

A. Description of the Legal Framework 35

B. Analysis of the Excess Costs Provision 37

V. Programs for Disadvantaged Children 43

A. Introduction 43

B. Description of the Legal Framework........ 43

1. Definition of the Term "Disadvantaged" 43

2. Mainstreaming 45

3. Authorized Uses of Set-Aside Funds for the Disadvantaged 45

4. Subpart 4 Special Programs for the Disadvantaged.. 46

C. Analysis of the Legal Framework for the Set-Aside and Subpart 4 49

1. Introduction 49

2. Definition of the Term "Disadvantaged"........ 49

3. Relationship Between the Set-Asides and Subpart 4. 51

4. Relationship Between Set-Asides, Subpart 4 and Compensatory Programs 51

5. Absence of Program Design Requirements in the VEA 52

VI. Programs for Handicapped Students 52

A. Introduction 52

B. Description of the Legal Framework 52

C. Analysis of the Legal Framework 55

1. Introduction 55

2. Definition of the Term "Handicapped" Student 56

Page

3. Relationship Between VEA Funds and Federal and State Special Education Funds 57

4. Relationship Between Special Education Educators and Vocational Education Educators in the Design of Vocational Programs for Handicapped Student 57

CHAPTER 8

VEA Assistance for Special Needs Populations

I. Introduction and Overview

A. Purpose and Organization of the Chapter

The previous chapter explained that the present Federal approach for ensuring equal opportunity to vocational education programs for special needs populations has two basic components. The first component (which was the subject of the previous chapter) consists of civil rights statutes which prohibit recipients of Federal financial assistance from discriminating against students on the basis of race, color, national origin, sex, and handicapping condition in the delivery of vocational education programs. These civil rights laws establish rights to equal and effective opportunity but do not provide Federal assistance to help pay for the extra costs which are frequently associated with ensuring these civil rights.

The second component of the Federal strategy for ensuring equal opportunity is to provide Federal financial assistance to help recipients meet their civil rights obligations and to assist recipients provide equal opportunity to students who are not otherwise protected by civil rights statutes but who are in need of special assistance, *e.g.*, academically and economically disadvantaged students.

The purpose of this chapter is to analyze the mechanisms contained in the VEA that are designed to assist recipients to meet their civil rights obligations to limited-English-proficient and handicapped children and provide equal opportunity for academically and economically disadvantaged students. The primary mechanisms in the VEA include: (1) national priority set-asides for handicapped and disadvantaged students (including limited-English-proficient students, (2) subpart 4 (special programs for the disadvantaged), (3) program design requirements governing the use of set-aside and subpart 4 funds, and (4) standards for distributing set-aside and subpart 4 funds among eligible recipients. Mechanisms (1) through (3) are analyzed in this chapter; the funds distribution mechanism (mechanism (4)) is addressed in Chapter 4.

This chapter is divided into six sections. The first section includes the major findings, conclusions, and recommendations The second section contains an in-depth analysis of the minimum percentage requirements applicable to the national priority programs for the disadvantaged and handicapped. The third section analyses the matching requirements. The fourth section analyzes the excess costs provisions. The fifth section analyzes the specific provisions governing the design and implementation of programs for the disadvantaged. The final section analyzes the specific provisions governing the design and implementation of programs for handicapped students.

B. Overview of the Major Findings, Conclusions, and Recommendations

1. Legislative History

The legislative history accompanying the 1976 amendments to the VEA identifies several significant problems with respect to access by special needs populations to equal and effective vocational education programs and the rationale for the 1976 amendments.

First, the Senate Report explains that the set-asides for the disadvantaged and handicapped were initially established to provide a base amount each state must use for programs for students with special needs and to provide an incentive for the states to target more of their own funds on these special needs categories. These set-asides were added in 1968 because it was found during the consideration of the 1968 amendments that *only about 2 percent of the Federal funds* were spent on programs for special needs populations.[1] Second, the House Report explains that evaluations of vocational programs, including a GAO report and Project Baseline found that students with special needs were *not* being adequately served.[2] Third, the House Report quotes William C. Geer, former Executive Director of the Council for Exceptional Children who told the House Committee that "free access for handicapped Americans still remains deplorably meager when compared with the impact intended in the 1968 amendments to the Act."[3] Fourth, the House Report identifies as part of the problem of lack of equal opportunity the fact that *training programs for disadvantaged and handicapped students inevitably cost more per enrollee*. Project Baselines 1975 annual report states:

> When money is tight, as it was in 1974, the hard decisions that educators make will lead to trimming costs wherever they can, especially per student costs.[4]

---

[1] Senate Report No. 94-882, at 54.

[2] House Report No. 94-1085, at 14.

[3] *Id.*

[4] *Id.*

Fifth, the House Report concluded that "if the numbers of disadvantaged and handicapped enrollees are to be increased, then the impetus must come from additional Federal funds."[5]

The VEA, as amended in 1976, retains the national priority set-aside programs for disadvantaged and handicapped persons and includes subpart 4 (special programs for the disadvantaged). Set out below is a summary of our major findings, conclusions, and recommendations regarding the overall strategy for providing assistance to special needs population and an analysis of the specific mechanisms in the existing VEA.

2. Summary of Findings and Conclusions Regarding the Present Approach for Providing Assistance to Special Needs Populations

In general, we conclude that the basic mechanism of "setting-aside" a prescribed amount of VEA funds for special needs populations is a viable approach for furthering the VEA objective of assisting recipients pay for the extra costs frequently associated with providing equal opportunity to special needs populations. However, we conclude that subpart 4 (special programs for the disadvantaged) should be folded into the set-aside for the disadvantaged.

With respect to the new set-aside (which would combine the existing set-asides and subpart 4), we make the following recommendations. First, set-aside funds should be distributed among eligible recipients in accordance with the standards set out in chapter 4.

---

[5] *Id.*

Second, set-aside funds should be used to pay for the extra costs associated with providing equal opportunity to special needs populations. However, the current standards adopted by ED for determining compliance with the excess costs provision should be abandoned because they are unclear, inconsistent, and overly burdensome. In their place, ED should adopt standards which take into consideration the limited amount of set-aside funds received by a typical recipient, the capabilities of recipients to document compliance, and the administrative burdens placed on recipients.

Third, if Congress (in accordance with our recommendation--see chapter 4) eliminates the match for other aspects of the VEA, it should also eliminate the match for the set-asides for the reasons set out in chapter 4. However, if Congress generally retains the match, it should still consider repealing the match for set-asides using the analytic framework suggested infra.

Finally, the VEA should be amended to include specific process standards applicable to recipients which maximize the likelihood that programs for the disadvantaged are of sufficient size, scope, and quality to provide a reasonable likelihood of success. The relationship between vocational education personnel and special education personnel should also be clarified.

3. Summary of Findings and Conclusions Regarding Specific Provisions in the Existing VEA

The first component of the set-aside in the existing VEA is the minimum percentage requirement. Under the VEA, as amended in 1976, states must use 20 percent of the appropriations under subpart 2 (basic grant) and subpart 3 (program improvement and supportive services) for disadvantaged students and 10 percent for handicapped students. Several persons interviewed questioned the appropriateness of the size of the set-asides given the other mandated uses under the VEA and other state priorities (such as reindustrialization) which they felt were more pressing. In short, several persons described the equal access provisions (e.g., the set-asides) as being in "conflict" with other objectives of the VEA, e.g., to expand and improve vocational education programs. The nature of the "conflict" resulted from the fact that the demand for VEA funds to accomplish the various objectives was significantly greater than the amount of funds made available by Congress.

A major policy question is whether the minimum percentage requirement is an appropriate mechanism for assisting recipients to provide equal educational opportunity for disadvantaged and handicapped students i.e., whether the mechanism is resulting in a greater amount of expenditures under the VEA for such students than would have occurred but for the provision. Several state directors, including those who expressed a desire to free up the set-aside funds for other purposes, readily admitted that the state would not be expending VEA funds at the current level for the disadvantaged and handicapped if it were not for the set-aside provision.

We conclude that the minimum percentage provision is a viable mechanism for ensuring that additional VEA funds are expended on disadvantaged and handicapped students in furtherance of the VEA objective of assisting recipients to provide equal and effective access to programs for such students.

The appropriateness of the amount of the set-aside for special need populations under the current VEA is beyond the scope of this study. In determining how much should be set-aside (or placed in a separate part under our recommendation), Congress must weigh competing legislative objectives and decide the amount of funds it desires to support each objective. In making its determination, Congress should be cognizant of the fact that it has enacted several civil rights statues such as Title VI of the Civil Rights Act of 1964 and Section 504 of the Rehabilitation Act of 1973 which require that recipients ensure equal and effective opportunity, an obligation which often results in additional costs for a recipient. These civil rights statutes do not include Federal grant programs to assist recipients meet their legal obligations. The set-asides under the VEA for limited-English-proficient (part of the disadvantaged set-aside) and handicapped students provide such assistance. If Congress were to reduce the amount of the set-aside, the nature and extent of a recipient's obligation to these students would not be diminished; there simply would be less VEA funds available to assist recipients meet their civil rights obligations. In short, recipients would have to appropriate additional state and local funds to make up for the reduction in assistance under the VEA.

The second component of the set-aside is the matching provision. The 1976 Amendments to the VEA require that the Federal dollars spent under the handicapped set-aside be matched dollar-for-dollar with state and local dollars to pay for the excess costs of services to these students. Similarly, Federal dollars for the disadvantaged must be matched dollar-for-dollar with state and local funds for the disadvantaged.

However, the 1979 Technical Amendments authorize states, pursuant to regulations to be established by the Secretary, to increase the Federal share of set-aside programs for handicapped and disadvantaged (including LESA) and stipends to amounts greater than 50 percent (and reduce the state share accordingly) for LEAs and OERs which are otherwise financially unable to provide matching payments. To date, the Secretary has not issued final regulations. The absence of final regulations implementing the 1979 Technical Amendments means that states are unable to take advantage of the more flexible provisions contained in the amendments.

The fundamental issue with respect to the matching provisions of the set-asides for special needs populations is whether they should be repealed or substantially modified. If Congress repeals the matching provisions relating to other aspects of the VEA, it should also repeal the matching provisions applicable to the set-asides for the reasons set out in chapter 4. However, if Congress decides to generally retain matching we recommend that Congress use the following analytic framework for addressing the issues for the set-asides. The proposed framework is derived from a recent GAO study on matching provisions in Federal programs.[6]

---

[6] Comptroller General's Report to the Congress: Proposed Changes in Federal Matching and Maintenance of Effort Requirements for State and Local Governments (GAO Report, December 23, 1970).

(1) What is the rationale for the matching provision applicable to the set-asides for special needs populations?

(2) Is it achieving its intended objectives?

(3) Is it causing undesirable consequences for state and local fiscal stability and independence?

(4) Does it tend to frustrate the achievement of other Federal objectives, *e.g.*, funding local recipients most in need?

(5) Do comparable laws contain matching provisions? If not what makes the matching provision in the VEA unique?

Set out below is an analysis of each of these factors.

The only *rationale* for the matching provisions applicable to the set-asides for special needs populations articulated in the legislative history is a statement in the Senate Report accompanying the 1976 amendments that the set-aside was included to provide an *incentive* for the *states to target more of their funds on special needs categories*.

The second issue is whether the matching provisions are achieving their intended objectives of generating additional state and local dollars for special needs populations. This issue is beyond the scope of our study. However, other research being conducted for and by NIE should provide relevant data.[7]

The third issue of whether the matching provision is causing undesirable consequences for state and local fiscal stability and independence is also beyond the scope of this study. However, in addressing the issue, Congress should consider a GAO finding that all matching requirements which are effective, i.e., actually stimulate additional state and local funds by definition have consequences on fiscal stability and independence. The question for Congress to determine is whether the extent of the state or local commitment of resources required by the VEA is overly burdensome. The question of burden is addressed in depth by other research projects funded by NIE.[8]

---

[7] Project on National Vocational Education Resources, University of California, Berkeley.

The fourth question is whether the matching provisions frustrate the achievement of other VEA objectives e.g., funding local recipients most in need. The 1979 Technical Amendments were designed to eliminate the conflict between the goal of providing assistance to recipients in greatest need of such assistance (e.g., low fiscal ability) and the burden placed on such recipients. To date, ED has not issued final regulations implementing the 1979 Amendments and therefore the conflict persists. Even if the proposed regulations were adopted, as presently written, several state directors felt that they would not effectuate Congressional intent. This is because the proposed regulations: (1) place a heavy emphasis on the ability of the state (rather than particular local recipients) to demonstrate fiscal inability in order to qualify for the reduced match whereas the statute and legislative history appear to place a greater emphasis on local inability, irrespective of state fiscal ability and (2) require additional VEA funds to be used to make up for the reduced state or local match.

---

[8] Id.

The final issue which Congress should consider is whether other comparable laws contain matching provisions and, if not, what makes the VEA matching provisions unique. Congress has enacted several other education and training programs which are targeted on the same special needs populations served by the VEA national priority set-aside and subpart 4, including Title I of ESEA, CETA and Part B of EHA (as amended by P.L. 94-142). None of these laws contains matching provisions.

Several state personnel questioned why the VEA should be treated in a different fashion. The legislative history does not provide any explanation for this different treatment. There are two possible explanations which we have identified. One possible explanation is that historically the VEA has included matching provisions and past practice should be retained for all major categories of mandatory expenditures, including set-asides for special needs populations. This rationale obviously does not explain why the VEA set-aside for special populations are treated differently than other comparable laws.

A second possible explanation is that unlike Title I, CETA, and P.L. 94-142 under which all funds are used for categorical programs for the special needs populations, under the VEA some funds are used for general aid for vocational education. In other words, matching under the set-asides arguably is included as a quid pro quo for permitting states to use some VEA funds to aid vocational education programs generally.

In summary, we recommend that if Congress generally retains matching, it should use the analytic framework set out above to determine whether or not to retain the matching provisions for the set-asides for special needs populations.

The third major component of the set-aside-provision for special needs populations is the excess costs requirement. As explained above, states must separately match VEA funds set-aside for handicapped persons and disadvantaged persons (including limited-English-speaking persons and stipends). The match for the set-asides for handicapped and disadvantaged persons (including limited-English-speaking persons) is based on the excess cost of programs, services and activities for such persons. The excess costs concept does not apply to stipends.

Excess costs are the costs of special educational and related services above the costs for non-handicapped students, non-disadvantaged persons and persons who are not classified as persons of limited-English-speaking ability, i.e., the additional costs associated with ensuring equal opportunity. OE has interpreted the excess cost requirement as having a different application for mainstreamed programs (VEA can only pay for excess costs) than for separate specialized programs for such persons (VEA can pay for the full costs).

Several problems and issues with respect to the excess costs provisions were identified by the project. First, several persons expressed a concern with the burden of keeping records to demonstrate compliance with the excess costs regulations. The burdens and problems identified are that (1) LEA accounting systems are not geared to provide the type of documentation required by the regulations, (2) the interpretation that LEAs operating separate programs may use VEA to pay for the full costs rather than the excess costs acts as a disincentive to mainstream special needs students, and (3) the small amount of funds made available under the set-asides when compared with the administrative burden of keeping adequate records has the effect of discouraging applications for the assistance or results in noncompliance with the requirements.

The problems with the excess costs provision identified should be considered in light of statements by other Federal and state persons interviewed. As one government official explained, "if the Office for Civil Rights and the Office of Special Education ever took their jobs seriously and required compliance with Title VI, Section 504, and P.L. 94-142, there would be little bickering about the excess costs and matching provisions since the costs of compliance with Title VI, 504, P.L. 94-142 would be far greater than the current Federal, state, and local expenditures for special needs populations in vocational programs."

We conclude that the inclusion of an excess costs provision or an equivalent is necessary to ensure that VEA set-aside funds are used to pay only for the extra costs associated with ensuring equal opportunity for special needs populations. The local recipient should be responsible for providing the same level of fiscal support to special needs populations as it provides to other children. To the extent it costs extra to meet the special needs of disadvantaged and handicapped students, these extra costs should be paid for in part from VEA. To repeal the excess provision would mean that LEAs could use VEA funds to replace state and local funds which would have been made available for special needs populations and use the freed-up funds for property tax relief or general aid,_e.g._, to buy gym equipment or band uniforms. In short, the excess cost _concept_ should be retained and specifically included in the VEA. However, we conclude that the excess costs provision, as _presently interpreted_ by ED should _not_ be retained since it is unclear, vague, internally inconsistent, overly burdensome, and creates disincentives to comply with VEAs objectives of mainstreaming special needs students. We recommend that the interpretation of excess costs under the VEA be modified to balance the need to avoid VEA set-aside funds being used as general aid or property tax relief with the administrative burdens associated with demonstrating compliance.

The current Title I guidelines implementing the supplanting and excess costs provisions reflect such a balance and should be used as a model. In general, the Title I regulations use "_presumptions_" to indicate compliance with the excess costs provisions rather than relying solely on strict child-by-child accounting or tracking dollars down to the child level. The Title I guidelines include separate tests for in-class programs, pull-out programs, replacement programs (_i.e._, separate classes which replace the regular instruction)and add-on programs (before or after school). For example, the VEA regulations could include a test which states that a recipient will be presumed in compliance with the excess cost provision if it uses VEA set-aside funds to pay for special services which may not be provided with state and local regular vocational education funds, e.g., special equipment or braille books, and that set-aside funds have been exhausted in the process of purchasing special goods or services. The documentation requirement for the presumption would simply be to show that VEA set-aside funds were used to pay for these services; not documentation that every special needs child actually received the same amount of dollars as the non-special needs child. Further, ED could adopt a special test for recipients receiving less than a given amount of set-aside funds (e.g., $2,000) which uses an assurance that VEA funds would only be used to pay for the extra costs of ensuring equal opportunity.

The fourth component of the legal framework constituting the set-asides for the special needs populations includes the program design and implementation provisions. We conclude that the specific requirements governing the design, implementation, and evaluation of VEA programs by local recipients for disadvantaged students are not sufficiently clear and comprehensive to maximize the likelihood that funds will be used in an effective and efficient manner. Given the limited size of the appropriations for disadvantaged students, it is essential that these limited dollars not be spread so thinly that they have little, if any, effect. The provision applicable to handicapped students in secondary schools is generally adequate because it requires that LEAs generally use VEA funds in accordance with the comprehensive standards set out in P.L. 94-142. The legal framework governing programs for handicapped students in postsecondary institutions is inadequate but could be made adequate through a simple reference to the regulations implementing Section 504 of the Rehabilitation Act of 1973, which provide standards governing such issues as: admission, participation in academic programs, nonacademic activities, and services normally provided to non-handicapped persons (e.g., employment).

II. The Minimum Percentage Requirements

A. Description of the Legal Framework

1. Overview

Under section 110 of the VEA, a total of 30 percent of the aggregate amount of funds available under section 102(a) must be used for handicapped and disadvantaged students.[9] Separate percentage set-asides are required for disadvantaged and handicapped students and the set-aside for the disadvantaged has an internal percentage set-aside for persons with limited-English-speaking ability (LESA). Moreover, these set-asides are mutually exclusive, that is, funds used to meet one may not be counted towards the funds required to meet another national priority set-aside.[10]

Unlike the 80-20 percentage split between subparts 2 and 3, the percentage requirements for these set-aside programs are not fixed amounts, but rather are minimum percentages which may be exceeded. In addition, funds used to satisfy these set-asides may come from either or both of the funds earmarked from subpart 2 (80% of section 102(a) allotment) or from subpart 3 (20% of section 102(a) allotment).[11]

---

[9] Section 110 also sets-aside 15 percent of funds available under Section 102(a) for postsecondary programs. These three set-asides are referred to as the "National Priority Programs."

[10] OE, BOAE Policy Memorandum, FY 79-14, to State Directors for Vocational Education (September 4, 1977).

Federal funds used for state and local administration of each national priority program may be included in calculating compliance with each program's set-aside, but the $50,000 allocation for sex equity personnel may not be counted towards these percentages "[s]ince the work of the full-time sex-equity personnel is to focus on all vocational education programs in the state and the personnel are nowhere directed to give differentiated attention to the populations who are the targets of section 110 minimum percentages....." [12]

2. Set-Aside for Handicapped Students

A minimum of 10 percent of the funds available to a state under section 102(a) must be used "to pay for up to 50 percent of the costs of programs, services, and activities under subpart 2 and of program improvement and supportive services under subpart 3 for handicapped persons."[13] The regulations require that these funds be used to pay for the excess costs of programs, services and activities for the handicapped,[14] and to the "maximum extent possible ... assist handicapped persons to participate in regular vocational education programs."[15]

---

[11] The percentage-set-asides for national priority programs are based on the total amount of funds available to a state under section 102(a) and need not be separately calculated for basic grant (subpart 2) funds and program improvement and supportive services (subpart 3) funds. Q and A No. 18, 42 FR 53866.

[12] OE, BOAE policy memorandum, FY 78-14, to State Directors for Vocational Education at 2 (September 4, 1979).

[13] Section 110(a) (20 U.S.C. 2310(a)). The term "handicapped" is defined in appendix A to the regulations. This definition paraphrases the statutory definition section 195(7) (20 U.S.C. 2461); the regulations also cite to section 602(1) of the Education of the Handicapped Act.

3. Minimum Percentages for Disadvantaged and Limited-English-Speaking-Ability Persons and for Stipends

A minimum of 20 percent of a state's section 102(a) allotment must be used to provide vocational education to disadvantaged and limited-English-speaking-ability persons and stipends authorized under section 120(b)(1)(G).[16] The minimum percentage for these three uses is referred to by ED as the "minimum percentage for the disadvantaged."[17]

By statute, a certain percentage of the disadvantaged set-aside must be set-aside for programs for LESA persons.[18] This internal set-aside for LESA persons was added by the 1976 amendments. The percentage of the 20 percent set-aside that must be used for persons of limited-English-speaking-ability is equivalent to the proportion which such persons aged 15 to 24 are of the total population of the state within this age group. This proportion determines the minimum amount for LESA persons. "The amount expended for this purpose shall not exceed the 20 percent set-aside for the disadvantaged under section 110(b)."19/

---

[14] 34 C.F.R. § 400.303(a). The concept of excess costs is discussed *infra*.

[15] 34 C.F.R. § 400.312.

[16] Section 110(b) (20 U.S.C. 2310(b)).

[17] 34 C.F.R. § 400.313 (heading); Persons having limited English-speaking ability or needing stipends because of acute economic needs appear to be within the definition of "disadvantaged" in the regulations, Appendix A.

[18] Section 110(b)(2) (20 U.S.C. 2310(b)(2)). For a detailed interpretation of the LESA set-aside *see* Staff Bulletin OVAE/DSVPO-SB-80-6 (August 5, 1980).

Once the amount of the set-aside for LESA persons has been determined, a state has discretion about the proportion of the remaining set-aside funds to use for vocational education for disadvantaged persons or for stipends under section 120(b)(1)(G) for students entering or enrolled in vocational education programs who have acute economic needs which cannot be met under work-study programs.20/ A set-aside for disadvantaged persons was in the VEA prior to the 1976 amendments, but the authority to use these funds for stipends was added by the 1976 amendments "to give the vocational education program some of the same flexibility in meeting the needs of people as the CETA programs now have."21/

Set-aside funds for vocational education programs for disadvantaged and LESA persons may be used only to pay for the excess cost of such programs.22/ The excess cost requirement does not apply to funds used for stipends.23/

19/ 34 C.F.R. §400.313(c)(6).

20/ Section 110(b) of the VEA (20 U.S.C. 2310(b)).

21/ H.R. Rep. No. 94-1085 at 47.

22/ 34 C.F.R. §400.303(b).

23/ In many cases, however, the cost of stipends for persons with acute economic needs would appear to be an amount over and above the base cost of vocational or nonvocational education.

B. Analysis of the Set-Asides for the Disadvantaged and Handicapped

1. Introduction

There are three major issues pertaining to the set-asides for disadvantaged and handicapped students.

(1) Whether these set-asides should be retained and, if so, at what level?

(2) Whether the separate set-asides should be combined into a single set-aside?

(3) Whether states which can demonstrate that they are already meeting the needs of all handicapped students from other sources should be exempted from the minimum percentage requirements?

These issues are discussed below.

2. Retention and Amount of the Set-Aside

Several persons interviewed questioned the appropriateness of the size of the set-asides given the other mandated uses under the VEA and other state priorities (such as reindustrialization) which they felt were more pressing. In short, several persons described the equal access provisions (e.g., the set-asides) as being in "conflict" with other objectives of the VEA e.g., expand and improve vocational education programs. The nature of the "conflict" resulted from the fact that the demand for VEA funds to accomplish the various objectives was significantly greater than the amount of funds made available by Congress.

A major policy question is whether the minimum percentage requirement is an appropriate mechanism for assisting recipients to provide equal educational opportunity for disadvantaged and handicapped students i.e., whether the mechanism is resulting in a greater amount of expenditures under the VEA for such students than would have occurred but for the provision. Several state directors, including those who expressed a desire to free up the set-aside funds for other purposes, readily admitted that the state would not be expending VEA funds at the current level for the disadvantaged and handicapped if it were not for the set-aside provision.

We conclude that the minimum percentage provision is a viable mechanism for ensuring that additional VEA funds be expended on disadvantaged and handicapped students in furtherance of the VEA objective of assisting recipients to provide equal and effective access to program for such students. However, we recommend that the VEA be amended to combine the set-asides and subpart 4.

The appropriateness of the amount of the set-asides for special need populations under the current VEA is beyond the scope of this study. In determining how much should be set-aside (or placed in a separate part under our recommendation), Congress must weigh competing legislative objectives and decide the amount of funds it desires to support each objective. In making its determination, Congress should be cognizant of the fact that it has enacted several civil rights statutes such as Title VI of the Civil Rights Act of 1964 and Section 504 of the Rehabilitation Act of 1973 which *require* that recipients ensure equal and effective opportunity, an obligation which often results in additional costs for a recipient. These civil rights statutes do *not* include Federal grant programs to assist recipients meet their legal obligations. The set-asides under the VEA for limited-English-proficient (part of the disadvantaged set-aside) and handicapped students provide such assistance. If Congress were to reduce the amount of the set-aside, the nature and extent of a recipient's obligation to these students would *not* be diminished; there simply would be less VEA funds available to assist recipients meet their civil rights obligations. In short, recipients would have to appropriate additional *state and local funds* to make up for the reduction in assistance under the VEA.

3. Separate vs. Single Set-Aside

We conclude that the present structure which provides for separate set-asides should be retained. One state director explained that if the set-asides were combined, there would be a war between the various special populations and the educationally and economically deprived students would probably lose since handicapped and limited-English-speaking-ability students are ensured equal opportunity under civil rights statutes (Section 504 of the Rehabilitation Act of 1973 and Title VI of the Civil Rights Act of 1964) and states would use the set-aside to pay for civil right mandates until the money ran out and whatever was left (if anything) would go to the disadvantaged.

In sum, we conclude that if Congress wants to ensure that states serve all of these populations, then the present structure which provides for separate minimum percentages should be retained. If Congress wants to authorize states to select among these students, then a single set-aside would be appropriate.

4. Exemption From Set-Aside for Handicapped Students

Part B of EHA, as amended by P.L. 94-142 exempts, in part, states from the supplanting provisions if they can demonstrate by clear and convincing evidence that the state has made available a free appropriate public education to all handicapped students.

Congress should consider using the incentive presently set out in Part B of EHA as the basis for considering the inclusion of an incentive in VEA that would permit states to use set-aside funds for other purposes when it can demonstrate that it is already meeting the needs of all handicapped students in vocational education from other sources.

In assessing the viability of this option, Congress should weigh the following factors.

(1) Has the waiver set out in Part B of EHA proven to be realistic (has any one applied) and workable (was the Secretary able to come up with standards for determining whether the threshold standard had been met)?

(2) Should handicapped persons or their representatives be provided notice and an opportunity to challenge a state's assertions?

(3) What standards can be used to determine whether all postsecondary vocational students who are handicapped have been provided equal and effective opportunity? (The standards set out in Part B of EHA apply to secondary -- not postsecondary students)?

III. The Matching Requirements for the Set-Asides

A. Description of the Legal Framework

1. General Standards Applicable to all Matching Provisions in the VEA

The VEA contains several different matching requirements, including matching requirements applicable to national priority programs. Before describing the matching requirements applicable to national priority programs, the following general principles applicable to all matching provisions are described.

First, the state match can be met only with actual expenditures of state and local funds.[24] In-kind contributions are not acceptable at either the state or local level,[25] nor, in general, are other Federal funds.[26]

---

[24] Interpretation in letters from Charles H. Buzzel, Acting Deputy Commissioner, BOAE to Gwendolyn Kean, Commissioner of Education, Virgin Islands Department of Education (January 18, 1978) and to Homer E. Edwards, Senior Program Officer, VTE, Region V -- Chicago (January 11, 1978). In other words, state and local funds may be considered as matching funds in the year they are obligated and expended. 34 C.F.R. §400.301(d).

[25] 34 C.F.R. §400.301(d) and comment, 42 F.R. 53876 (Oct. 3, 1977). Tuition fees also may not be used to meet the matching requirement. Q & A 42 F.R. 53866.

[26] Interpretation in letter from Charles H. Buzzel, Acting Deputy Commissioner, BOAE to William Wenzel, Assistant Commissioner of Education, Division of Vocational Education, New Jersey State Department of Education (1978).

Second, both state and local funds may be included in a state's match under the VEA; and a state must report on its compliance with the matching requirements in its five-year state plan,[27] annual program plan,[28] and accountability report.[29]

ED regulations also prohibit state funds from being used to match federal funds for more than one federal program.[30]

2. Matching Standards Applicable to the Set-Asides

The 1976 Amendments to the VEA require that the Federal dollars spent under the handicapped and disadvantaged set-sides be matched dollar-for-dollar with state and local dollars. The match for each of the set-asides is separate from the overall match the state provides for VEA funding. In other words, Federal dollars for the handicapped must be matched with state and local funds which are used to provide services to these students. Similarly, Federal dollars for the disadvantaged must be matched with state and local funds for the disadvantaged.

---

[27] 34 C.F.R. §400.186(d).

[28] 34 C.F.R. §400.222(d).

[29] 34 C.F.R. §400.241(a)(3).

[30] OVAE Legal Opinions Handbook at p.156 (Nov. 22, 1978).

Congress added the requirement that states separately match each national priority program in the 1976 amendments in response to a finding in a GAO report that some states had not spent any of their own funds for vocational education for disadvantaged or handicapped. The GAO report expressed concern that states were using Federal funds to supplant state and local funds for these purposes.[31] Prior to the 1976 amendments, the VEA included set-asides for handicapped, disadvantaged and postsecondary and adult programs but did not require a separate state match for each of these set-asides.

Although each set-aside must be separately matched by a state, the match for each set-aside remains a statewide aggregate match, i.e., each recipient operating a program under a set-aside[32] need not meet the matching requirement.

State and local funds used to match federal funds for national priority programs may not be used as matching funds for more than one of the three general set-asides of Section 110, e.g., each dollar of state funds used for handicapped persons in postsecondary institutions can be used as the state match for either handicapped or postsecondary programs, but not both.[33]

---

[31] S. Rep. No. 94-882 at 78; H.R. Rep. No. 94-1085 at 46.

[32] Notice of Interpretation, 43 FR 12757 (March 27, 1978).

[33] Policy Memorandum, BOAE/DSVPO FY 79-14 (Sept. 4, 1979) at 2.

Although state and local special education funds used as state matching funds under P.L. 94-142 may not be also used as VEA matching funds, other state and local special education funds used for handicapped students in vocational programs can be used to satisfy the state match under the VEA.[34]

The basic state match under the set-asides for disadvantaged and handicapped students is at least 50 percent of the excess costs of programs, services, and activities under subparts 2 and 3 for which these set-aside funds are used and, in the case of stipends under Section 110(b), 50 percent of the cost (not excess cost) of such stipends.[35] However, the 1979 Technical Amendments authorize states, pursuant to regulations to be established by the Secretary, to increase the Federal share of set-aside programs for handicapped and disadvantaged (including LESA) and stipends to amounts greater than 50 percent (and reduce the state share accordingly) for LEAs and OERs which are otherwise financially unable to provide such payments.[36] Although based on LEA and OER inability to provide matching payments, this provision permits a reduction in the state match for these national priority programs. According to the House Report, this 1979 amendment was made because some states had difficulty spending national priority program funds under the existing matching requirement because of widespread state and local tax cutting initiatives, and some states had resorted to imposing matching requirements on local educational agencies and and other eligible recipients.[37] The four states included in our study imposed matching requirements on local recipients.

---

[34] OVAE Legal Opinions Handbook at 156 (November 22, 1978)

[35] 34 C.F.R. §400.303(a) and (b).

[36] §110(e) of the VEA, as added by P.L.96-46 (1979 Technical Amendme

[37] House Report, P.L. 96-46 (1979 Technical Amendments) at 10.

Regulations implementing this permissable reduction in the state match have not yet been issued in final form. However, the House Report indicates, by example, that an aggregate statewide match for these set-asides might be 40 percent and the federal share would be 60 percent.[38] The amendment is also intended to permit states to make larger payments for set-aside purposes to those LEAs and OERs that are otherwise financially unable to mount these programs.

On April 28, 1980, ED published a Notice of Proposed Rulemaking (NPRM) implementing the 1979 Technical Amendments.[39] The NPRM sets out among other things, the criteria for demonstrating financial inability. The criteria are as follows:

> (1) Available revenue is substantially reduced due to exceptional and unexpected circumstances such as--
> (i) A natural or man-made disaster;
> (ii) The unexpected removal of property from the tax roll by government action; or
> (iii) The unexpected departure of an industrial or commercial entity.
> (2) Eligible recipients within the State have reached their bonding or taxing limits and, as a result are unable to generate necessary revenues to operate national priority programs for the handicapped or disadvantaged.
> (3) The State's tax effort for public education is greater than the national average, yet the State's per pupil expenditures for public education are below the national average. For purposes of this section, tax effort means the aggregate of State and local revenues spent for public elementary and secondary education as a percentage of total personal income of the citizens of the State.

---

[38] House Report, P.L. 96-46 (1979 Technical Amendments), at 10.

[39] 45 F.R. 28288-28296 (April 28, 1980).

> (4) The State is subject to other unique fiscal or budgetary conditions which are beyond the control of the State and which prevent the State from providing sufficient matching funds.

The NPRM also provides that the state must use additional VEA funds above the minimum percentages currently required to substitute for the matching portion which the state is unable to provide.

On December 23, 1980, the U.S. General Accounting Office published a paper entitled "Proposed Changes in Federal Matching and Maintenance of Effort Requirements for State and Local Governments" (GAO Report). The paper contains a comprehensive analysis of Federal laws which contain matching and maintenance of effort provisions. The analysis of the VEA matching provision for set-aside programs set out below draws heavily from the GAO Report.

B. Analysis of the VEA Matching Provision for Set-Asides

The fundamental issue with respect to the matching provisions of the set-asides for special needs populations is whether they should be repealed or substantially modified. If Congress repeals the matching provisions relating to other aspects of the VEA, it should also repeal the matching provisions applicable to the set-asides for the reasons set out in chapter 4. However, if Congress decides to generally retain matching we recommend that Congress use the following analytic framework for addressing the issues for the set-asides. The proposed framework is derived from the recent GAO study on matching provisions in Federal programs.

(1) What is the rationale for the matching provision?

(2) Is it achieving its intended objectives?

(3) Is it causing undesirable consequences for state and local stability and independence?

(4) Does it tend to frustrate the achievement of other Federal objectives, e.g., funding local recipients most in need?

(5) Do comparable laws contain matching provisions? If not, what makes VEA set-aside provisions unique?

Four rationales are often cited to justify the inclusion of matching provisions:

(a) Helps the Federal government limit total budgetary outlays and spreads limited dollars to a larger number of grantees by passing on some of the costs to non-Federal sources; (p. 6)

(b) Leverages a total public sector resource commitment far exceeding the limited Federal dollars available; (p. 8)

(c) Serves as a litmus test of state and local interest in grant programs, i.e., it serves as a screening device; (p.17)

(d) State and local governments will take a more active interest in overseeing and managing the Federal grant project if their own money is involved. (p.20-21)

Set out below is an analysis of the matching provisions in light of the five issues identified by GAO (see above).

The only rationale for the matching provisions applicable to the set-asides for special needs populations articulated in the legislative history is a statement in the Senate Report accompanying the 1976 amendments that the set-aside was included to provide an incentive for the states to target more of their funds on special need categories.

The second issue is whether the matching provisions are achieving their intended objectives of generating additional state and local dollars for special needs populations. This issue is beyond the scope of our study. However, other research being conducted for an by NIE should provide relevant data.[40]

The third issue of whether the matching provision is causing undesirable consequences for state and local fiscal stability and independence is also beyond the scope of this study. However, in addressing the issue, Congress should consider a GAO finding that all matching requirements which are effective, i.e., actually stimulate additional state and local funds, by definition have consequences on fiscal stability and independence. The question for Congress to determine is whether the extent of the state or local commitment of resources required by the VEA is overly burdensome. The question of burden is addressed in depth by other research projects funded by NIE.[41]

The fourth question is whether the matching provisions frustrate the achievement of other VEA objectives e.g., funding local recipients most in need. The 1979 Technical Amendments were designed to eliminate the conflict between the goal of providing assistance to recipients in greatest need of such assistance (e.g., low fiscal ability) and the burden placed on such recipients. To date, ED has not issued final regulations implementing the 1979 Amendments and therefore the conflict persists. Even if the proposed regulations were adopted, as presently written, several state directors felt that they would not effectuate Congressional intent. This is because the proposed regulations: (1) place a heavy emphasis on the ability of the state (rather than particular local recipients) to demonstrate fiscal inability in order to qualify for the reduced match whereas the statute and legislative history appear to place a greater emphasis on local inability, irrespective of state fiscal ability and (2) require additional VEA funds to be used to make up for the reduced state or local match.

---

[40] Berkeley studies.

[41] Id.

The final issue which Congress should consider is whether other comparable laws contain matching provisions and, if not, what makes the VEA matching provisions unique. Congress has enacted several other education and training programs which are targeted on the same special needs populations served by the VEA national priority set-aside and subpart 4, including Title I of ESEA, CETA and Part B of EHA, as amended by P.L. 94-142. None of these laws contains matching provisions.

Several personnel questioned why the VEA should be treated in a different fashion. The legislative history does not provide any explanation for this different treatment. There are two possible explanations which we have identified. One possible explanation is that historically the VEA has included matching provisions and past practice should be retained for all major categories of mandatory expenditures, including set-asides for special needs populations. This rationale obviously does not explain why the VEA set asides for special populations are treated differently than other comparable laws.

A second possible explanation is that unlike Title I, CETA, and P.L. 94-142, under which all funds are used for categorical programs for the special needs populations, under the VEA some funds are used for general aid for vocational education. In other words, matching under the set-asides arguably is included as a quid pro quo for permitting states to use some VEA funds to generally aid vocational education programs.

In summary, we recommend that if Congress generally retains matching, it should use the analytic framework set out above to determine whether or not to retain the matching provisions for the set-asides for special needs populations.

IV. The Excess Costs Provision

A. Description of the Legal Framework

As explained above, states must separately match VEA funds set-aside for (i) handicapped persons and (ii) disadvantaged persons (including limited-English-speaking persons) and stipends.[42] ED has interpreted Section 110 to require that set-asides (and the match) for handicapped and disadvantaged persons (including limited English-speaking persons) be used to pay for the excess costs of programs, services and activities under subpart 2 (basic grant) and subpart 3 (program improvement and supportive services[43] for such persons. The excess costs concept does not apply to stipends. ED explained that it applied the concept of "excess cost" because permitting VEA and state matching funds to pay for the full cost of vocational education for handicapped and disadvantaged persons might result in a reduction of services for such persons.[44]

Excess costs are the costs of special educational and related services above the costs for non-handicapped students, non-disadvantaged persons and persons who are not classified as persons of limited-English-speaking ability.[45] ED has interpreted the excess cost requirement as having a different application for mainstreamed programs than for separate specialized programs for such persons.

---

[42] Sec. 110(a) and (b) of the VEA (20 U.S.C. 2310(a) and (b)); 32 C.F.R. §400.303.

[43] 34 C.F.R. §400.303(a) and (b).

[44] Notice of Interpretation, 43 F.R. 12757 (March 27, 1978).

[45] 34 C.F.R. §400.303(a) and (b).

In a mainstreamed program, excess costs are the costs of extra or supplemental support to the handicapped or disadvantaged student in a regular vocational class or "to the instructors in the class."[46] This support may include, among other things, "the assignment of special personnel to the class, special program modifications or the provision of special remedial education instruction, counseling, or other services to the handicapped or disadvantaged students enrolled in regular classes."[47]

For example, if, in a particular mainstreamed program, the cost of providing vocational training in electronics to the non-handicapped or non-disadvantaged student is $600 and the cost of providing supportive services in vocational training in electronics to the handicapped or disadvantaged student in the same class is $150, the State may use the combined Federal funds and State and local funds to pay only the incremental cost of $150 for vocational training in electronics for the handicapped or disadvantaged student. Under the OE interpretation, the excess cost requirement pertaining to mainstreaming applies to the aggregate of all state and local funds expended for excess costs for such persons and no separate match on a program by program basis is required.

If a separate specialized program is warranted for handicapped or disadvantaged students, funds set aside under Section 110(a) and (b) may pay for the full cost of the entire separate specialize program so long as the average statewide (state and local) expenditure per student for handicapped persons equals or exceeds the average per student expenditure for non-handicapped persons; and the average statewide (state and local) expenditure, per student for disadvantaged persons equals or exceeds the average per student expenditure for non-handicapped persons.[48]

---

[46] Notice of Interpretation, 43 F.R. 12757 (Mar. 27, 1978).

[47] Id.

B. Analysis of the Excess Costs Provision

Several problems and issues with respect to the excess costs provisions were identified in our study. First, several persons expressed a concern with the burden of keeping records to demonstrate compliance with the excess costs regulations. The burdens and problems identified are that (1) LEA accounting systems are not geared to provide the type of documentation required by the regulations, (2) the interpretation that LEAs operating separate programs may use VEA to pay for the full costs rather than the excess acts as a disincentive to mainstream special needs students, and (3) the small amount of funds made available under the set-asides when compared with the administrative burden of keeping adequate records has the effect of discouraging application for the assistance or results in widescale noncompliance with the requirements.

The problems with the excess costs provision identified should be considered in light of statements by other Federal and state persons interviewed. As one government official explained, "if the Office for Civil Rights and the Office of Special Education ever took their jobs seriously and required compliance with Title VI, Section 504, and P.L. 94-142, there would be little bickering about the excess costs and matching provisions since the costs of compliance with Title VI, 504, P.L. 94-142 would be far greater than the current Federal, state, and local expenditures for special needs populations in vocational educational programs."

---

[48] Id.

We conclude that the inclusion of an excess costs provision or an equivalent is necessary to ensure that VEA set-aside funds are used to pay only for the extra costs associated with ensuring equal opportunity for special needs populations. The local recipient should be responsible for providing the same level of fiscal support to special needs populations as it provides to other children. To the extent it costs extra to meet the special needs of disadvantaged and handicapped students, these extra costs should be paid for in part from the VEA. To repeal the excess costs provision would mean that LEAs could use VEA funds to replace state and local funds which would have made available for special needs populations and use the freed-up funds for property tax relief or general aid, *e.g.*, to buy gym equipment or band uniforms. In short, the excess cost *concept* should be retained and specifically included in the VEA.

However, we conclude that the excess costs provision, as *presently interpretated* by ED should *not* be retained since it is unclear, vague, internally inconsistent, overly burdensome, and creates disincentives to comply with VEAs objectives of mainstreaming special needs students.

State interviews and an analysis of the written interpretations provide support for the conclusion set out above. First, the test used to determine whether a recipient operating a "mainstream program" is complying with the excess costs provision is unclear and overly restrictive. It is unclear because it does not delineate what constitutes "supplemental support" (see description above) and it is overly restrictive because it requires documentation that each child is receiving the average expended for similar children out of state and local funds (e.g., $600) before VEA funds (e.g., $150) may be expended on a disadvantaged or handicapped child. This type of child-by-child documentation (i.e., tracking the VEA funds down to the child level is beyond the capability of most school districts in this country. As one State director explained:

> First, unlike for handicapped children districts do not track disadvantaged children individually, nor do they have individual educational plans that will allow them to do this. Thus, the voc ed requirement imposes additional obligations for tracking. In addition, vocational education dollars are peanuts for disadvantaged students and some large districts have not been able to use these funds because of the administrative burdens of complying with the existing regulations.

Second, the tests used to determine whether a recipient operating a separate specialized program is complying with the excess costs provisions are unclear, ambiguous and are internally inconsistent and inconsistent with Congressional intent. The interpretation by ED which permits VEA funds to pay for the full costs of separate programs is on its face inconsistent with the concept of excess costs; i.e., one can either pay for the full costs or the excess costs of a program. Children in separate programs are entitled to the same level of regular state and local vocational educational funds as they would have received in the absence of the VEA and VEA funds (and the state match) then to be used for the additional or excess costs. To permit recipients to pay for the full costs with VEA funds means that the state funds which would have been used for these children can now be used as general aid and/or property tax relief.

Assuming for arguments sake that ED's interpretation of excess costs in separate settings is deemed to be consistent with the VEA, the interpretation is still internally inconsistent. On the one hand the interpretation provides that the programs may be funded in full with the VEA set-aside and state match.[49] On the other hand, the interpretation states:

> However, the average statewide
> (state and local) expenditure,
> per student, for handicapped persons
> must equal or exceed the average per
> student expenditure for non-handicapped
> persons.[50]

If recipients are paying the full costs of programs out of the VEA funds and state match, how is it possible to ensure that program participants are receiving the same average expenditure out of state and local funds as nonparticipants? State persons interviewed either were unaware of the quoted language or simply ignored it! Those who were aware of it also explained that a statewide concept of excess costs was unworkable in that the concept must be based on the unique characteristics of each recipien

---

[49] 43 F.R. 12758 (March 27, 1978).
[50] Id.

The above analysis should not be construed as indicating an insurmountable problem of policy development. We recommend that the interpretations of excess costs under the VEA be modified to balance the need to avoid VEA set-aside funds being used as general aid or property tax with the administrative burdens associated with demonstrating compliance.

The current Title I guidelines implementing the excess costs and supplanting provisions reflect such a balance, and should be used as a model.[51] In general, the Title I regulations use "presumptions" to indicate compliance with the excess costs provisions rather than relying solely on strict child-by-child accounting or tracking dollars down to the child level. The Title I guidelines include separate tests for in-class programs, pull-out programs, replacement programs (i.e., separate classes which replace the regular instruction) and add-on programs (before or after school). For example, the VEA regulations could include a test which states that a recipient will be presumed in compliance with the excess cost provision if it uses VEA set-aside funds to pay for special services which may not be provided with state and local regular vocational education funds, e.g., special equipment or braille books, and that set-aside funds have been exhausted in the process of purchasing special goods or services. The documentation requirement for the presumption would simply be to show that VEA set-aside funds were used to pay for these services; not documentation that every special needs child actually received the same amount of dollars as the non-special needs child. Further, ED could adopt a special test for recipients receiving less than a given amount of set-aside funds (*e.g.*, $2,000) which uses an assurance that VEA funds would only be used to pay for the extra costs of ensuring equal opportunity.

---

[51] See 34 C.F.R. §200.94 (46 F.R. 5146, January 19, 1981) as modified by 46 F.R. 18976 (March 27, 1981). See also, 34 C.F.R. §201.133 and .134.

V. Programs for Disadvantaged Students

A. Introduction

The previous sections of this chapter analyzed the general issues that are applicable to the set-asides for the disadvantaged as well as handicapped students. The purpose of this section is to analyze the specific provisions applicable to the disadvantaged set-aside and subpart 4 of Part A of the VEA which provides 100 percent funding for special programs for the disadvantaged.

B. Description of the Legal Framework

1. Definition of the Term "Disadvantaged

The VEA states that the Term "disadvantaged" means "persons (other than handicapped persons) who have academic or economic handicaps and who require special services and assistance in order to enable them to succeed in vocational education programs under criteria developed by the Secretary based on objective standards and the most recent available data."[52]

The "criteria developed by the Secretary" are set out in the regulations.[53] The regulations define the term "academic disadvantage" to mean that "a person lacks reading and writing skills, lacks mathematical skills or performs below grade level."

---

[52] Sec. 195(16) of the VEA (20 U.S.C. 2461(16)).

[53] Appendix A, 42 F.R. 53864.

Resurge '79, an OVAE manual for identifying, classifying and serving the disadvantaged and handicapped under the VEA,explains that "academically disadvantaged individuals do not have the academic skills to succeed at the time of entrance or while enrolled in a vocational education program. ...[T]hey require supportive services or special programs to enable them to meet the requirements for entrance into the program or to continue and complete the program."[54] The term "economic disadvantage" means family income is at or below the national poverty level, participants or parents or guardian of the participant is unemployed, participant or parent is recipient of public assistance or participant is institutionalized or under state guardianship.

The legislative history explains that the definition of the term "disadvantaged" was modified in 1976 in response to widespread criticism of the previous definition which stated that disadvantaged means anyone who has "academic, socioeconomic, or other handicaps that prevent them from succeeding in the regular vocational education program."[55] Questions were raised about whether the person had to be in a regular program and fail in that program before he or she could qualify. The legislative history also explains that "economic disadvantage is the clearest hardship which a person can have in order to show the need for additional services" and that another clear indication of a need for additional assistance is that "someone is not succeeding in the regular academic program in a school and risks dropping out of school as a result."[56]

---

[54] Resurge '79 Manual for Identifying, Classifying, and Serving the Disadvantaged and Handicapped Under the Vocational Education Amendments of 1976 (P.L. 94-482) at 22.

[55] H.R. Rep. No. 94-1085 at 35.

2. Mainstreaming

The VEA requires that states must use VEA funds, to the maximum extent feasible, to assist disadvantaged students to participate in regular vocational education programs.[57] ED's interpretation of the excess costs provision includes the following clarification regarding the mainstreaming requirement.[58]

> The removal of...disadvantaged students from the regular education environment may occur only when the nature or severity of the...disadvantage is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily. In order to achieve this end, ...disadvantaged students should be placed, if possible, in a mainstreamed program.

3. Authorized Uses of Set-Aside Funds for the Disadvantaged

ED's interpretation of the VEA excess costs provision generally describes authorized uses of VEA funds in mainstreamed as well as separate programs.[59] With respect to mainstreamed programs, extra support is provided to the disadvantaged students or to the instructors in the class.

---

[56] Id.

[57] Sec. 110(d) of the VEA (20 U.S.C. 2310); 34 C.F.R. §400.313 (b). See also, NPRM 45 F.R. 28293 (April 28, 1980).

[58] 43 F.R. 12757 (March 27, 1978).

[59] Id.; See also, 34 C.F.R. §400.313.

> This supplemental support may take the form of the assignment of special personnel to the class, special program modifications, or the provision of special remedial education instruction, counseling, or other services to the handicapped or disadvantaged students enrolled in regular classes. These additional services may be paid for out of Federal funds and matching State and local funds under section 110(a) and (b) set-aside.

With respect to separate programs, VEA and state matching funds may be used to pay for the full costs of programs (see supra).

Resurge '79 contains examples of the types of services which may be funded under the VEA set-aside:

- Survey/Evaluations
- Outreach Activities
- Identification and Testing
- Staff Development
- Curriculum Modifications
- Curriculum Development
- Remedial Services
- Counseling Services

4. Subpart 4 - Special Programs for the Disadvantaged

In addition to the set-aside for the disadvantaged under which the state must expend at least 20 percent of its subpart 2 (basic grant) and subpart 3 (program improvement and supportive services) for such children, the VEA includes subpart 4 which provides 100 percent Federal funding for special programs for the disadvantaged.[60] Eligibility for participation in the special programs is limited to persons who because of academic or economic disadvantage:

> (1) Do not have, at the time of entrance into a vocational education program, the prerequisites for success in the program; or who
>
> (2) Are enrolled in a vocational education program but require supportive services or special programs to enable them to meet the requirements for the program that are established by the state or the local educational agency.[61]

A state must use the funds available under the separate authorization, in accordance with the approved five-year state plan and annual program plan, for special programs of vocational education for disadvantaged persons in areas of high concentration of youth unemployment or school dropouts[62] (the statute says "and").[63]

---

[60] Sec. 140 of VEA (20 U.S.C. 2370); 34 C.F.R. §400.801. The term "disadvantaged" is defined in Sec. 195(16) of VEA and the definition, as interpreted by OE, appears in appendix A of the regulations and 34 C.F.R. §400.804. This definition is identical to the definition applicable to set-aside programs.

[61] Sec. 140 of VEA (20 U.S.C. 2370); 34 C.F.R. §400.804(d).

[62] For further discussion of this priority factor see discussion supra, chapter 2.

[63] Id.; 34 C.F.R. §400.802(a). In response to a comment, OE explains the rationale for changing "and" in the statute to "or" in the regulations. In order to provide a degree of consistency in the regulations for funding those progams which require prioritizing of local applications on the basis of youth unemployment or school dropouts (the work study program, the cooperative vocational education program, and special programs for the disadvantaged), the **word "and" has been changed to "or". Funds may be used in areas of either high concentration of youth unemployment or high concentration of school dropouts.** (42 F.R. 53885 (Oct. 3, 1977)).

A state must use the funds under the separate authorization to pay up to 100 percent of the cost of special programs for disadvantaged persons.[64/]

Funds available under the separate authorization may be used in addition to funds made available to the state for basic grants (section 120 of the Act), provided, that the funds are used to conduct special programs of vocational education for the disadvantage to enable them to succeed in vocational education programs.[65/]

A recent policy memorandum explains that Subpart 4 funds may be used to pay all directly related costs for the special progams including such costs as may be necessary for administration, ancillary services, and such support services as recruitment, guidance counseling, placement, evaluation, and follow-up.[66/]

States receiving grants under Subpart 4 must make specific provision for the participation of students enrolled in non-profit private schools and must ensure that VEA funds are not commingled.[67/]

[64/] Sec. 140 of VEA (20 U.S.C. 2370); 34 C.F.R. §400.802.

[65/] Id.

[66/] Policy Memorandum BOAE/DSVPO FY 79-8 (May 4, 1979).

[67/] Sec. 140 of VEA (20 U.S.C. 2370); 34 C.F.R. §400.803.

C. Analysis of the Legal Framework for the Set-Aside and Subpart 4

1. Introduction

There are four major issues concerning the set-aside for the disadvantaged and subpart 4 special programs for the disadvantaged.

(1) Is the definition of the term "disadvantaged" clear?

(2) What is the relationship between the set-aside and subpart 4?

(3) What is the relationship between the set-aside and subpart 4 programs and compensatory education programs like Title I of ESEA?

(4) Is the VEA legal framework specific enough to maximize the likelihood that set-aside and subpart 4 funds are used to fund programs for a limited number of children which are of sufficient size, scope, and quality?

Each of these issues is discussed below.

2. Definition of the Term "Disadvantaged"

Two separate issues surfaced regarding the definition of the term "disadvantaged." The first issue concerns the relationship between academically and economically disadvantaged. Since the need for special services in order to succeed in vocational education programs is a condition for being considered "disadvantaged", it appears that eligibility should be limited to the academically disadvantaged. The economic status of an individual child is a relevant causal factor which should be taken into consideration in the design of a program, not for purposes of determining eligibility. Even

Title I of ESEA, with its strong focus on poverty, only uses low-income to determine which schools will receive assistance and not to determine student eligibility (which is based solely on academic disadvantagement).

Congress should consider amending the VEA to conform with Title I's definition. Such a change would not prohibit a recipient from using VEA funds for work study or stipends. The revised definition of "disadvantaged" persons should read:

> Persons whose educational attainment is below the level that is appropriate for children of their age and require special services, assistance or programs in order to enable them to succeed in vocational education programs.

The second issue regarding the definition is its treatment of handicapped students. As presently written, the definition can, and often is, construed to restrict participation in programs for all handicapped students including students with "mental, physical, and emotional handicaps."[68] This exclusion is overly broad and has the effect of subjecting otherwise qualified handicapped persons to discrimination on the basis of handicap.

For example, a mobility-impaired child who receives special physical education may wish to enroll in a vocational education program. Assume he or she is academically disadvantaged but does not require any special education for academic deficiencies, just some remedial tutoring of the kind normally provided in the set-aside program for the disadvantaged. Should this handicapped student be excluded from participation in the set-aside program for the disadvantaged when he or she is otherwise qualified and would not be receiving needed services under the set-aside for the handicapped? We recommend that Congress clarify the situations under which handicapped persons may receive assistance under the set-aside for the disadvantaged.

---

[68] Resurge '79 at 21 and 27.

3. Relationship Between the Set-Asides and Subpart 4

State personnel interviewed provided significantly different answers to the relationship between the set-asides and subpart 4. With respect to the design of programs some persons explained that the programs are identical; others explained that subpart 4 monies are used for separate programs for those furthest behind. All persons described the obvious differences with respect to matching (set-aside: yes; subpart 4: no) and the applicable priority considerations (the subpart 2 funds are prioritized according to the two application approval criteria; the subpart 4 funds require that priority go to areas of high concentration of youth unemployment or school dropouts). We recommend that the set-aside for the disadvantaged and subpart 4 be combined. Subpart 4 would simply be folded into the set-aside for the disadvantaged.

4. Relationship Between Set-Asides, Subpart 4 and Compensatory Programs

Under the present VEA, there is no mention of the need to coordinate the provision of programs under the set-aside and subpart 4 with programs operated under Title I of ESEA, although the objectives of the various provisions are comparable. States report that few efforts are made at the state or local level to bring about such coordination. We recommend that Congress consider requiring coordination between these two Federal programs.

5. Absence of Program Design Requirements in the VEA

Under Title I of ESEA, recipients must design programs which are based on identified needs and which are of sufficient size, scope, and quality to show reasonable progress toward meeting the needs of the program participants. These provisions are included to avoid dilution of services so that even though everyone is not provided with services, those who receive services are ensured high-quality services. The VEA does not ensure that the limited resources are focused on a limited number of children. We recommend that Congress include in the VEA program design standards to increase the likelihood that programs will be successful.

VI. Programs for Handicapped Students

A. Introduction

This section of the paper focuses on the special provisions applicable to the delivery of services under the set-asides to handicapped students.

B. Description of the Legal Framework

As explained *supra*, 10 percent of the subpart 2 and 3 funds must be spent for programs for handicapped students. For purposes of the VEA, "handicapped" means:[69]

(a) A person who is:
  (1) Mentally retarded;
  (2) Hard of hearing;
  (3) Deaf;

---

[69] Section 195(17) of the VEA (20 U.S.C. 2461).

  - (4) Speech impaired;
  - (5) Visually handicapped;
  - (6) Seriously emotionally disturbed;
  - (7) Orthopedically impaired; or
  - (8) Other health impaired persons, or persons with specific learning disabilities; and

- (b) Who, by reason of the above:
  - (1) Requires special education and related services; and
  - (2) Cannot succeed in the regular vocational education program without special educational assistance; or
  - (3) Requires a modified vocational education program.

The VEA regulations include several provisions which specify the relationship between VEA and Part B of EHA, as amended by P.L. 94-142.

§400.105 of the VEA regulations sets out requirements under Part B of EHA that apply to the administration of programs for the handicapped under the VEA. The EHA provisions specify, among other things, that all programs for handicapped students in the state are under the general supervision of persons in the SEA responsible for the education of handicapped students, that VEA funds must be consistent with the goal of providing a free appropriate public education to all handicapped children, and that all activities must meet the standards of the SEA.

States applying for assistance under the VEA must assure that VEA funds will be used for purposes consistent with the state plan submitted under Part B of EHA[70] and procedures for complying with this assurance and a comparable. States report that few efforts are made at the state or local level to bring about such coordination. We recommend that Congress consider requiring coordination between these two Federal programs.

---

[70] 34 C.F.R. §400.141(f)(10).

5. Absence of Program Design Requirements in the VEA

Under Title I of ESEA, recipients must design programs which are based on identified needs and which are of sufficient size, scope, and quality to show reasonable progress toward meeting the needs of the program participants. These provisions are included to avoid dilution of services so that even though everyone is not provided with services, those who receive services are ensured high-quality services. The VEA does not ensure that the limited resources are focused on a limited number of children. We recommend that Congress include in the VEA program design standards to increase the likelihood that programs will be successful.

VI. Programs for Handicapped Students

A. Introduction

This section of the paper focuses on the special provisions applicable to the delivery of services under the set-asides to handicapped students.

B. Description of the Legal Framework

As explained *supra*, 10 percent of the subpart 2 and 3 funds must be spent for programs for handicapped students. For purposes of the VEA, "handicapped" means:[69]

(a) A person who is:
    (1) Mentally retarded;
    (2) Hard of hearing;
    (3) Deaf;

---

[69] Section 195(17) of the VEA (20 U.S.C. 2461).

(4) Speech impaired;
(5) Visually handicapped;
(6) Seriously emotionally disturbed;
(7) Orthopedically impaired; or
(8) Other health impaired persons, or persons with specific learning disabilities; and

(b) Who, by reason of the above:
  (1) Requires special education and related services; and
  (2) Cannot succeed in the regular vocational education program without special educational assistance; or
  (3) Requires a modified vocational education program.

The VEA regulations include several provisions which specify the relationship between VEA and Part B of EHA, as amended by P.L. 94-142.

§400.105 of the VEA regulations sets out requirements under Part B of EHA that apply to the administration of programs for the handicapped under the VEA. The EHA provisions specify, among other things, that all programs for handicapped students in the state are under the general supervision of persons in the SEA responsible for the education of handicapped students, that VEA funds must be consistent with the goal of providing a free appropriate public education to all handicapped children, and that all activities must meet the standards of the SEA.

States applying for assistance under the VEA must assure that VEA funds will be used for purposes consistent with the state plan submitted under Part B of EHA[70] and procedures for complying with this assurance and a description of how the program will be planned and coordinated must be included in each state's five-year plan.[71]

---

[70] 34 C.F.R. §400.141(f)(10).

Obligations for mainstreaming and authorized uses are comparable to the provisions described supra with respect to disadvantaged students.[72] Resurge '79 points out two authorized uses which are specifically applicable to handicapped students. First, under subpart 2, recipients may make physical modifications to area vocational schools for mobility-impaired students. While Resurge '79 explains that VEA funds may be used for making such facilities accessible, it strongly recommends the use of state and local funds:[73]

> It is strongly recommended that State and local funds be used for the following purpose. Only in an unusual situation in which such funds are not available and a handicapped person would be denied access to a vocational program should Federal vocational monies be used. To the greatest extent possible, vocational education funds should be used for vocational education programs and services.
>
> Construction Modifications for Handicapped in Area Vocational Schools (Subpart 2, Section 120 (b)(E):
>
> . Ramps for students who cannot use stairs
>
> . Rest room facilities adapted for persons in wheelchairs or other handicapped persons
>
> . Handrails in washrooms and corridors

---

[71] 34 C.R.F. §400.182(f).

[72] Specific provisions concerning mainstreaming of handicapped students are set out in 34 C.F.R. §400.312.

[73] Resurge '79 at 17.

The second authorized use is for equipment modification.[74]

Equipment Modification for Handicapped (Part C, Section 195(1) and (7))

- Written instruction in Braille
- Large print materials
- Signals which use sound rather than sight for the visually handicapped
- Signals which use sight rather than sound for the hearing handicapped
- Special safety devices, such as guard rails, around moving parts of machinery
- Sensory devices
- Printed rather than verbal instructions for the hard-of-hearing
- Sound amplification devices
- Note taking systems
- Teletypewriter
- Adaptations of regular equipment, such as hand controls added to machines usually operated by foot controls or vice versa
- Special desks and work tables for students in wheel chairs

C. Analysis of the Legal Framework

1. Introduction

There are three major issues concerning the implementation of programs for the handicapped under the VEA set-aside.

---

[74] Id.

description of how the program will be planned and coordinated must be included in each state's five-year plan.[71]

Obligations for mainstreaming and authorized uses are comparable to the provisions described supra with respect to disadvantaged students.[72] Resurge '79 points out two authorized uses which are specifically applicable to handicapped students. First, under subpart 2, recipients may make physical modifications to area vocational schools for mobility-impaired students. While Resurge '79 explains that VEA funds may be used for making such facilities accessible, it strongly recommends the use of state and local funds:[73]

> It is strongly recommended that State and local funds be used for the following purpose. Only in an unusual situation in which such funds are not available and a handicapped person would be denied access to a vocational program should Federal vocational monies be used. To the greatest extent possible, vocational education funds should be used for vocational education programs and services.
>
> Construction Modifications for Handicapped in Area Vocational Schools (Subpart 2, Section 120 (b)(E):
>
> - Ramps for students who cannot use stairs
> - Rest room facilities adapted for persons in wheelchairs or other handicapped persons
> - Handrails in washrooms and corridors

---

[71] 34 C.R.F. §400.182(f).

[72] Specific provisions concerning mainstreaming of handicapped students are set out in 34 C.F.R. §400.312.

[73] Resurge '79 at 17.

The second authorized use is for equipment modification.[74]

Equipment Modification for Handicapped (Part C, Section 195(1) and (7))

- Written instruction in Braille
- Large print materials
- Signals which use sound rather than sight for the visually handicapped
- Signals which use sight rather than sound for the hearing handicapped
- Special safety devices, such as guard rails, around moving parts of machinery
- Sensory devices
- Printed rather than verbal instructions for the hard-of-hearing
- Sound amplification devices
- Note taking systems
- Teletypewriter
- Adaptations of regular equipment, such as hand controls added to machines usually operated by foot controls or vice versa
- Special desks and work tables for students in wheel chairs

C. Analysis of the Legal Framework

1. Introduction

There are three major issues concerning the implementation of programs for the handicapped under the VEA set-aside.

---

[74] *Id*.

(1) The appropriateness of the definition of "handicapped" student for postsecondary recipients.

(2) The relationship between funds provided under VEA and Part B of EHA.

(3) The relationship between special and vocational educators in the placement of handicapped students in and the design, implementation, and evaluation of vocational education programs.

Each of these issues is analyzed below.

2. Definition of the Term "Handicapped" Student

The definition of the term "handicapped" student is virtually identical to the definition used in Part B of EHA. The similarity of the definition for secondary programs is commendable. But the definition is inappropriate in the postsecondary context. The definition uses the term "special education" which generally means the provision of a free appropriate public education, regardless of the nature or severity of a child's handicapping condition. Special education, i.e., free and public, does not apply to private postsecondary recipients charging tuition. We recommend that the definition of qualified handicapped person included in the Section 504 regulation be included for postsecondary program.[75] The regulations states:

> "Handicapped person." (1) "Handicapped person"means any person who (i) has a physical or mental impairment which substantially limits one or more major life activities, (ii) has a record of such an impairment, or (iii) is regarded as having such an impairment.

---

[75] 34 C.F.R. 104.3(j) and (k)(3).

> With respect to postsecondary and vocational education services, a handicapped person who meets the academic and technical standards requisite to admission or participation in the recipient's education program or activity.

3. Relationship Between VEA Funds and Federal and State Special Education Funds

Several state vocational administrators expressed a reluctance to permit VEA set-aside funds to be used to provide support services for handicapped students since many felt that such services were already available in the schools and were funded through state and Federal special education programs. The need to update equipment and material for vocational programs for handicapped students was considered the best use of the set-aside funds.

The question for Congress is whether set-aside funds may be used in lieu of, as well as in addition to, Part B of EHA funds for handicapped children enrolled in vocational education programs. Congressional intent should be clarified.

4. Relationship Between Special Education Educators and Vocational Education Educators in the Design of Vocational Programs for Handicapped Students

One of the major themes of our interviews at the Federal and state levels concerned the difficulty of bringing together special education and vocational education personnel to design high quality vocational education programs. One person described the relationship as "two guilds fighting over turf." The vocational educators complain that they are not involved in the early stages of the evaluation and placement process and thus individualized education programs (IEPs)

(1) The appropriateness of the definition of "handicapped" student for postsecondary recipients.

(2) The relationship between funds provided under VEA and Part B of EHA.

(3) The relationship between special and vocational educators in the placement of handicapped students in and the design, implementation, and evaluation of vocational education programs.

Each of these issues is analyzed below.

2. Definition of the Term "Handicapped" Student

The definition of the term "handicapped" student is virtually identical to the definition used in Part B of EHA. The similarity of the definition for secondary programs is commendable. But the definition is inappropriate in the postsecondary context. The definition uses the term "special education" which generally means the provision of a free appropriate public education, regardless of the nature or severity of a child's handicapping condition. Special education, i.e., free and public, does not apply to private postsecondary recipients charging tuition. We recommend that the definition of qualified handicapped person included in the Section 504 regulation be included for postsecondary program.[75] The regulations states:

> "Handicapped person." (1) "Handicapped person"means any person who (i) has a physical or mental impairment which substantially limits one or more major life activities, (ii) has a record of such an impairment, or (iii) is regarded as having such an impairment.

---

[75] 34 C.F.R. 104.3(j) and (k)(3).

> With respect to postsecondary and vocational education services, a handicapped person who meets the academic and technical standards requisite to admission or participation in the recipient's education program or activity.

3. Relationship Between VEA Funds and Federal and State Special Education Funds

Several state vocational administrators expressed a reluctance to permit VEA set-aside funds to be used to provide support services for handicapped students since many felt that such services were already available in the schools and were funded through state and Federal special education programs. The need to update equipment and material for vocational programs for handicapped students was considered the best use of the set-aside funds.

The question for Congress is whether set-aside funds may be used in lieu of, as well as in addition to, Part B of EHA funds for handicapped children enrolled in vocational education programs. Congressional intent should be clarified.

4. Relationship Between Special Education Educators and Vocational Education Educators in the Design of Vocational Programs for Handicapped Students

One of the major themes of our interviews at the Federal and state levels concerned the difficulty of bringing together special education and vocational education personnel to design high quality vocational education programs. One person described the relationship as "two guilds fighting over turf." The vocational educators complain that they are not involved in the early stages of the evaluation and placement process and thus individualized education programs (IEPs) are often completed without the input of vocational educators. State personnel also cited to the provision in Part B of EHA which states that all programs in the state for handicapped persons must be under the supervision of the SEA persons generally responsible for educating handicapped persons as causing tension (see supra).

We recommend that Congress consider amending the VEA and Part B of EHA to formalize the responsibilities of vocational educators in the placement of handicapped students in and the design, implementation, and evaluation of vocational education programs.

CHAPTER 9

SEX EQUITY

are often completed without the input of vocational educators. State personnel also cited to the provision in Part B of EHA which states that all programs in the state for handicapped persons must be under the supervision of the SEA persons generally responsible for educating handicapped persons as causing tension (see supra).

We recommend that Congress consider amending the VEA and Part B of EHA to formalize the responsibilities of vocational educators in the placement of handicapped students in and the design, implementation, and evaluation of vocational education programs.

CHAPTER 9

SEX EQUITY

CHAPTER 9

SEX EQUITY

Page

I. Introduction 1
    A. Organization of the Chapter 1
    B. Congressional Interest in Sex Equity 2
        1. Congressional Findings 2
        2. Legislative Response 5
    C. Overview of the Major Sex Equity Mechanisms 7
        1. Federal Mechanisms 7
        2. State Structures and Processes, Including Mandatory and Permissive Uses of Funds 9
        3. Local Processes 14
    D. Major Findings, Conclusions, and Recommendations 15
        1. General Observations 17
        2. Summary of Major Findings, Conclusions, and Recommendations 18
            a. Mandatory expenditures for full-time sex equity personnel 18
            b. Mandatory expenditure for displaced homemakers and other special groups 18
            c. Authorized uses of funds 18
            d. Functions of the sex equity coordinator 19
            e. Policies for eradicating sex bias (including incentives) 19
            f. Results of policies and activities 19
            g. Local policies 19

II. Mandatory Expenditures of VEA Funds 20

    A. Introduction 20
    B. $50,000 for Full-Time Personnel 20
        1. Description 20
        2. Findings, Conclusions, and Recommendations 23
            a. The effect of the Tydings Amendment 23
            b. The necessity for a mandatory expenditure 24
            c. The effect of a uniform dollar amount for all states 25
    C. Displaced Homemakers and Other Special Groups 26
        1. Description 26
        2. Findings, Conclusions, and Recommendations 29

III. Authorized Uses of Funds 33

    A. Introduction 33
    B. Authorized Uses Under Subpart 2 33
        1. Description 33
            a. Support services for women 33
            b. Day care services 35
        2. Findings, Conclusions, and Recommendations 36

CHAPTER 9

SEX EQUITY

Page

I. Introduction 1

- A. Organization of the Chapter 1
- B. Congressional Interest in Sex Equity 2
  - 1. Congressional Findings 2
  - 2. Legislative Response 5
- C. Overview of the Major Sex Equity Mechanisms 7
  - 1. Federal Mechanisms 7
  - 2. State Structures and Processes, Including Mandatory and Permissive Uses of Funds 9
  - 3. Local Processes 14
- D. Major Findings, Conclusions, and Recommendations 15
  - 1. General Observations 17
  - 2. Summary of Major Findings, Conclusions, and Recommendations 18
    - a. Mandatory expenditures for full-time sex equity personnel 18
    - b. Mandatory expenditure for displaced homemakers and other special groups 18
    - c. Authorized uses of funds 18
    - d. Functions of the sex equity coordinator 19
    - e. Policies for eradicating sex bias (including incentives) 19
    - f. Results of policies and activities 19
    - g. Local policies 19

II. Mandatory Expenditures of VEA Funds 20

- A. Introduction 20
- B. $50,000 for Full-Time Personnel 20
  - 1. Description 20
  - 2. Findings, Conclusions, and Recommendations 23
    - a. The effect of the Tydings Amendment 23
    - b. The necessity for a mandatory expenditure 24
    - c. The effect of a uniform dollar amount for all states 25
- C. Displaced Homemakers and Other Special Groups 26
  - 1. Description 26
  - 2. Findings, Conclusions, and Recommendations 29

III. Authorized Uses of Funds 33

- A. Introduction 33
- B. Authorized Uses Under Subpart 2 33
  - 1. Description 33
    - a. Support services for women 33
    - b. Day care services 35
  - 2. Findings, Conclusions, and Recommendations 36

Page

C. Authorized Uses Under Subpart 3 37
  1. Description 37
    a. Supportive services 37
    b. Program improvement 42
  2. Findings, Conclusions, and Recommendations 44

IV. State Policies and Activities 46

A. Introduction 46
B. The Functions of the Full-Time Sex Equity Personnel 46
  1. Description 46
  2. Findings, Conclusions, and Recommendations 51
    a. The degree of overlap among the categories of activities in the ten functions 52
    b. The lack of clear standards concerning adequate performance of functions 54
C. Policies for Eradicating Sex Bias (Including Incentives) 55
  1. Description 55
  2. Findings, Conclusions, and Recommendations 58
D. Descriptions of Uses in State Planning Documents ... 63
  1. Description 63
  2. Findings, Conclusions, and Recommendations 65
E. Results of Policies and Activities 66
  1. Description 66
  2. Findings, Conclusions, and Recommendations 69

V. Local Policies 70

A. Introduction 70
B. Description 70
  1. Submission of Applications 70
  2. Local Advisory Councils 72
    a. Establishment 73
    b. Composition 73
    c. Functions performed by local advisory councils 74
    d. Responsibilities of State Board and SACVE 74
C. Findings, Conclusions, and Recommendations 75

CHAPTER 9

SEX EQUITY

I. Introduction

A. Organization of the Chapter

This chapter concerns the VEA's legal framework for sex equity in vocational education. This introduction reviews pertinent congressional findings concerning the need for a legislative response to sex bias, stereotyping and discrimination in vocational education; presents an overview of the major sex equity mechanisms in the VEA's legal framework; and then sets forth our major findings, conclusions, and recommendations concerning the clarity, consistency, adequacy, and necessity of the sex equity provisions in the VEA's legal framework.

The analysis is selective. It focuses first on mandatory expenditures of VEA funds for sex equity, i.e., the minimum expenditure provisions for the full-time sex equity personnel and for displaced homemakers and other special groups.

Authorized uses of funds for sex equity are discussed next. These include (1) the use of basic grant funds under subpart 2 for support services for women and for day care services, and (2) the use of funds under subpart 3 for supportive services and program improvement. State policies and activities come after that in a section that examines the provisions concerning the full-time personnel, the policies and incentives for eradicating sex bias, the descriptions of funds use in state planning documents and the reporting of results of sex equity policies and

Page

C. Authorized Uses Under Subpart 3 37
  1. Description 37
    a. Supportive services 37
    b. Program improvement 42
  2. Findings, Conclusions, and Recommendations 44

IV. State Policies and Activities 46

A. Introduction 46
B. The Functions of the Full-Time Sex Equity Personnel 46
  1. Description 46
  2. Findings, Conclusions, and Recommendations 51
    a. The degree of overlap among the categories of activities in the ten functions 52
    b. The lack of clear standards concerning adequate performance of functions 54
C. Policies for Eradicating Sex Bias (Including Incentives) 55
  1. Description 55
  2. Findings, Conclusions, and Recommendations 58
D. Descriptions of Uses in State Planning Documents ... 63
  1. Description 63
  2. Findings, Conclusions, and Recommendations 65
E. Results of Policies and Activities 66
  1. Description 66
  2. Findings, Conclusions, and Recommendations 69

V. Local Policies 70

A. Introduction 70
B. Description 70
  1. Submission of Applications 70
  2. Local Advisory Councils 72
    a. Establishment 73
    b. Composition 73
    c. Functions performed by local advisory councils 74
    d. Responsibilities of State Board and SACVE 74
C. Findings, Conclusions, and Recommendations 75

CHAPTER 9

SEX EQUITY

I. Introduction

A. Organization of the Chapter

This chapter concerns the VEA's legal framework for sex equity in vocational education. This introduction reviews pertinent congressional findings concerning the need for a legislative response to sex bias, stereotyping and discrimination in vocational education; presents an overview of the major sex equity mechanisms in the VEA's legal framework; and then sets forth our major findings, conclusions, and recommendations concerning the clarity, consistency, adequacy, and necessity of the sex equity provisions in the VEA's legal framework.

The analysis is selective. It focuses first on mandatory expenditures of VEA funds for sex equity, i.e., the minimum expenditure provisions for the full-time sex equity personnel and for displaced homemakers and other special groups.

Authorized uses of funds for sex equity are discussed next. These include (1) the use of basic grant funds under subpart 2 for support services for women and for day care services, and (2) the use of funds under subpart 3 for supportive services and program improvement. State policies and activities come after that in a section that examines the provisions concerning the full-time personnel, the policies and incentives for eradicating sex bias, the descriptions of funds use in state planning documents and the reporting of results of sex equity policies and activities. The chapter concludes with an examination of provisions in the VEA legal framework related to local or recipient policies concerning sex equity in vocational education.

B. Congressional Interest in Sex Equity

A major purpose of the Vocational Education Amendments of 1976 was the enactment of provisions "designed to overcome sex discrimination and sex stereotyping in all occupational programs"[1] and"to lead to the elimination of sex bias." [2] Concern for sex equity, generated by testimony before congressional committees, infuses the legislative history of the Act. Examining labor market conditions, Congress found pervasive sex inequity, "reinforced by many of the current practices in vocational education,"[3] and noted "[a]ll witnesses concurred that the initiative for overcoming ... sex discrimination and sex stereotyping will have to be with new Federal legislation."[4]

1. Congressional Findings

The House Report documents the scope and seriousness of the problem:

> Ninenty percent of all women work for pay at some time in their lives. Over 33 million women --44 percent of all women of working age-- are presently working for pay, and this number comprises about 40 percent of the total labor force ... The vast majority of women work out of economic necessity, since two-thirds of all women workers are either single, divorced, widowed, separated, or married to men earning less than $7,000 per year. In

---

[1] S. Rep. No. 94-882 at 57.

[2] H.R. Rep. No. 94-1084 at 42.

[3] Id., at 21.

[4] Id., at 25.

> addition, female-headed families are on the increase in our society, and now constitute 11% of all families. For minority families the figure is much higher.

Despite their presence in vast numbers, and their pressing need for employment, "women who work ... earn on the average only 60% of a man's salary," "are concentrated in lower paying and less skilled jobs," and "have a much more limited range of traditional occupational fields from which to choose than men."[5] The House Committee concluded "women must seek non-traditional employment if they want higher wages."[6]

Against this background, the House Committee examined existing vocational education programs and found "vocational education is not ... preparing women for non-traditional work; rather it tends to reinforce ... labor market patterns."[7]

Vocational enrollments showed women were

> concentrated in a narrow range of courses that are female intensive and low paying ... [G]irls are channeled into home economics, health and office occupations. Boys are steered into agriculture, technical, and trade and industrial programs [and] ... have three times as many job options available to them within male intensive programs as girls have in female intensive programs.[8]

Congress found "vocational schools have done nothing to prevent programs from reflecting the general status of women in society."[9] Graphic testimony provided example after example how "beliefs of parents, societal attitudes about the inferior capabilities of women, and cultural role expectations act as constraints, encouraging schools to retain the status quo."10/ Some schools "actively barred students from certain programs on the basis of sex."11/ An HEW Office for Civil Rights survey of 1,400 vocational schools showed "more than 1,000 schools offer five or more vocational courses attended solely by one sex."12/

---

[5] *Id.*, at 21, 22.

[6] *Id.*, at 22.

[7] *Id.*

[8] *Id.*, at 21, 22.

[9] *Id.*, at 23.

Vocational enrollment was not the only area in which the committee found sex inequity prevalent.

> Staffing patterns among vocational administrators and teachers tend to follow the same pattern as vocational enrollments ... At the highest administrative levels women are virtually absent. There are no women State directors of vocational education. On the 56 State advisory councils, women constitute 40% of the membership. Only six advisory council chairpersons are women, and only two advisory council executive directors are women. 13/

Congress found sex bias in still other areas. The ratio of teachers to students in the most female intensive programs was less than that in male intensive programs, with the result that "women students have less instructional time from the teacher."14/ It was noted counselors "tend to reinforce sex stereotyping patterns," and witnesses testified to "sex discrimination in curricular materials, program publications, and testing instruments."15/

10/ Id.

11/ Id.

12/ Id.

13/ Id. at 24.

14/ Id.

15/ Id. at 25.

2. Legislative Response

Both the House and the Senate recognized the need for a legislative initiative addressing the multi-faceted problem of sex inequity in vocational education.16/ Different means to accomplish this objective, however, were proposed.

The House bill recommended that the State Board of vocational education designate an employee or employees to coordinate the State's effort to promote sex equity.

> This employee or these employees should review and report on progress in eliminating sex bias and sex stereotyping in all vocational education programs on the state, to make a recommendation to the State and local agencies for overcoming sex bias and sex stereotyping, and provide technical assistance to local educational agencies and other public agencies in overcoming sex bias and sex stereotyping in vocational education programs. 17/

The Senate bill recommended the creation of an office for women within the State Board of vocational education or another appropriate state agency. According to the Senate report, this office would assist the State Board in fulfilling the purposes of the Act by:

> Taking necessary action to create awareness of programs and activities in vocational education designed to reduce sex stereotyping in vocational education programs;
>
> Gathering, analyzing, and disseminating data on the status of men and women students and employees in the State's vocational education programs;
>
> Developing and supporting actions to carry out problems brought to the attention of the office through its data collection activities;

16/ Id. at 24; S. Rep. No. 94-882 at 57.

17/ H.R. Rep. No. 94-1085 at 38.

> Reviewing the distribution of grants by the State Board, to assure that the needs and interests of women are addressed in Federally-assisted projects;
>
> Reviewing all vocational education programs in the state for sex bias;
>
> Monitoring the implementation of laws prohibiting sex discrimination in all hiring, firing, and promotion procedures within the state related to vocational education;
>
> Reviewing and submitting recommendations concerning overcoming of sex stereotyping and sex bias in the annual program plan;
>
> Assisting local educational agencies and other interested parties in improving vocational education opportunities for women; and
>
> Developing an annual report on the status of women in vocational education programs in the State. 18/

The reconciliation of these and other differences in the bills by the Conference Committee produced the present statutory provisions concerning sex equity and a revised legislative declaration of purpose stating Federal grants to states for vocational education are to assist them

> To develop and carry out such programs of vocational education within each state so as to overcome sex discrimination and sex stereotyping in vocational education programs (including programs of homemaking) and thereby furnish equal educational opportunities in vocational education to persons of both sexes. 19/

18/ S. Rep. No. 94-882 at 58-59.

19/ Section 101 of the VEA (20 U.S.C. 2301). The Conference report states, in part,

> The managers have agreed to add to the Act a provision in the Declaration of Purpose, a provision authorizing funds to hire personnel to assist the States, and authority for grants to help overcome sex bias in order to encourage the States to carry out all programs of vocational education in such a manner as to be free from sex discrimination and sex stereotyping and in order to encourage the State to take vigorous action to overcome sex discrimination and sex stereotyping in vocational education.

H.R. (Conf.) Rep. No. 94-1701 at 213.

C. Overview of the Major Sex Equity Mechanisms

The 1976 VEA contains several categories of mechanisms or processes designed to help achieve congressional purposes with respect to sex equity in vocational education. These categories include: Federal mechanisms, state structures and processes, including mandatory and permissive uses of funds, and local processes. Each of these is described briefly below.

1. Federal Mechanisms

Responsibility for Federal administration of the VEA is now vested in the Department of Education's Office of Vocational and Adult Education (OVAE) which is headed by an Assistant Secretary. To advance toward congressional objectives concerning sex equity in vocational education, federal administrators use routine oversight mechanisms common to many Federal education programs, e.g., approval of state plans, monitoring, auditing, and evaluation. The VEA and its regulations also contain other Federal-level mechanisms oriented more specifically toward sex equity in vocational education.

First, the National Advisory Council on Vocational Education (NACVE) must include

> women with backgrounds and experiences in employment and training programs, who are knowledgeable with respect to problems of sex discrimination in job training and in employment, including women who are members of minority groups and who have, in addition to such backgrounds and experiences, special knowledge of the problems of discrimination in job training and employment against women who are members of such groups. 20/

20/ Section 162(a)(6) of the VEA (20 U.S.C. 2392(a)(6)).

Second, the Secretary of Education is authorized to use some discretionary research and development funds for contracts and grants for "programs of national significance."[21] Funds provided for such programs may be used to assist in overcoming sex bias and sex stereotyping through research, exemplary and innovative programs, curriculum development, vocational guidance and counseling, and vocational education personnel training, as well as for "activities which show promise of overcoming sex stereotyping and bias in vocational education."[22] The technical criteria for the award of such funds indicates that points will be given if the "application provides appropriate plans to eliminate sex bias and stereotyping in the proposed results, end products, and outcomes, and the proposed dissemination plans" and if female professional staff are used in such projects.[23]

Third, the Vocational Education Data System (VEDS) must include information on the sex of students.[24] The requirement for VEDS provides that the Secretary of Education and the Administrator of the National Center for Education Statistics must jointly develop information elements and uniform definitions for this national vocational education data reporting and accounting system.

Fourth, the Secretary of Education is authorized to provide leadership development awards to experienced vocational educators for full-time advanced study in vocational education and to award fellowships for undergraduate study in vocational education.[25/] The technical review criteria for both the awards and the fellowships indicate that equitable distribution of them to males and females will be considered. The technical review criteria for the fellowships indicate that points will be awarded to applicants whose goals are described in relationship to the elimination of sex stereotyping.[26/] Another factor to be considered in the award of fellowships is the applicant's intent to become certified in a vocational field not traditionally open to persons of the applicant's sex.[27/]

---

[21] Section 171(a)(1) (20 U.S.C. 2401(a)(1)).

[22] Id., Section 136 of VEA (20 U.S.C. 2356).

[23] 34 C.F.R. §406.110(k), (h)(4).

[24] Section 161(a)(1)(A) of the VEA (20 U.S.C. 2391(a)(1)(A); 34 C.F.R. §400.116(b)(1).

2. State Structures and Processes, Including Mandatory and Permissive Uses of Funds

The VEA establishes a basic grant for each state. The states are responsible for distributing the funds to local educational agencies and to private groups. Within this basic framework are several structures and processes, including provisions governing the use of funds, that are designed to increase the likelihood of achieving sex equity in vocational education.

First, states must spend no less than $50,000 in each fiscal year for full-time personnel to assist the State Board in providing equal opportunity in vocational education to both sexes and in eliminating sex bias, sex discrimination and sex

---

[25/] Section 172(a) and (c) of the VEA (20 U.S.C. 2402(a) and (c)); 34 C.F.R. §406.301 and §406.432.

[26/] 34 C.F.R. §406.443(e).

[27/] 34 C.F.R. §406.443(f).

stereotyping from all vocational education programs.[28] The functions these full-time personnel must perform include: (1) reviewing the state five-year and annual plans and making recommendations concerning the programs to eliminate sex bias; (2) creating awareness of programs and activities designed to reduce sex discrimination in vocational education; (3) collecting and analyzing data on the status of female students and employees; (4) monitoring grant distribution to ensure that the needs and interests of women are addressed by projects assisted under the Act; (5) monitoring all vocational education programs in the state for sex bias; (6) reviewing Title IX self-evaluations; (7) developing remedies and recommendations to overcome sex bias; (8) assisting local education agencies in their efforts to improve opportunities for women in vocational education; (9) monitoring the implementation of laws prohibiting sex discrimination in all employment within the state relating to vocational education; and (10) making available information developed as a result of carrying out the duties of the sex equity coordinator.[29]

Second, states seeking funds under the Act must submit five-year plans, annual program plans and accountability reports to the Secretary of Education. The five-year plan must include a detailed description of the state's plan to insure equal access for both sexes to vocational education programs. The plan must describe: (1) actions to overcome sex discrimination and sex stereotyping in all state and local vocational education programs; (2) incentives to encourage the enrollment of both sexes in nontraditional courses of study; (3) incentives to encourage the development of model programs to reduce sex bias and sex stereotyping in job training and placement for all occupations; and (4) programs to assess and meet the needs of displaced homemakers and other special groups.30/ The annual plans and the accountability reports must describe the results of the state's program to eliminate sex discrimination and to assure equal access for both sexes to vocational education.31/

---

[28] Section 104(b) and Section 120(b) of the VEA (20 U.S.C. 2304(b) and 2330(b)); 34 C.F.R. §400.74.

[29] 34 C.F.R. §400.75.

Third, persons interested in sex equity can participate in the state's vocational education planning process because the State Board must hold public hearings on the five-year plans, annual plans and accountability reports so that the public can comment on goals, programs and allocation of resources for vocational education.32/

Fourth, the VEA requires that the governor or the State Board of Education appoint a State Advisory Council on Vocational Education (SACVE) to assist the State Board in planning and evaluating vocational education programs, including programs to overcome sex bias.33/ The SACVE must appropriately represent both sexes, racial and ethnic minorities and the regions of the state, i.e., the council's composition must reflect the percentage of minorities and women either in the population or in the

---

30/ Section 107(b) of the VEA (20 U.S.C. 2307(b)); 34 C.F.R. §400.187.

31/ 34 C.F.R. §400.222(f)(2), §400.241(b)(1), §400.402.

32/ 34 C.F.R. §400.165 and §400.207.

33/ Section 105(a) of the VEA (20 U.S.C. 2305); 34 C.F.R.§400.91.

work force of the state.[34] Further, women, including minority women, must be appointed to the SACVE. The women must be experienced with employment and training programs and must be knowledgeable about the problems of sex discrimination in training and employment. Minority women appointed should have the same qualifications with regard to the problems faced by minority women.[35]

Fifth, the use of subpart 2 funds is authorized to provide day care services to children of students in vocational education programs.[36] Subpart 2 funds may also be used for support services for women who enter vocational education programs designed to prepare them for nontraditional jobs. Support services include counseling, job development, job follow-up support, and increasing the number of female instructors of nontraditional courses.[37] Some portion of subpart 2 funds *must* be used for vocational education programs for displaced homemakers, single heads of households, homemakers seeking employment, part-time workers seeking full-time jobs and persons seeking non-traditional jobs.[38] The programs must include organized education and training to prepare these individuals for employment, courses in job search techniques and placement services upon completion of the vocational education programs.[39]

---

[34] Section 105(a) of the VEA (20 U.S.C. 2305); 34 C.F.R.§400.92.

[35] *Id.*

[36] 34 C.F.R. §400.611.

[37] 34 C.F.R. §400.602 and §400.603.

[38] 34 C.F.R. §400.621.

[39] 34 C.F.R. §400.622.

Sixth, subpart 3 funds for program improvement and supportive services can be used for a variety of sex equity purposes. States may award grants for projects designed to overcome sex bias and sex stereotyping in vocational education programs and curriculum materials.[40/] Grant awards may also be used for programs to familiarize teachers, administrators and counselors with training to overcome sex bias.[41/] Contracts may be awarded for "exemplary and innovative projects" which must give "priority" to reducing sex bias and sex stereotyping in vocational education.[42/]

Seventh, subpart 5 funds are to be used for programs in consumer and homemaking education which must (1) encourage males and females to prepare for combining the roles of homemaker and wage-earner and (2) promote the development of curriculum materials which deal with the changing roles of women and men in the work world and the home.[43/]

In addition to the above, state agencies responsible for the administration of vocational education programs must adopt a compliance program to prevent, identify, and remedy discrimination by a subrecipient.[44/] Each state agency recipient performing oversight functions was required to submit to the Office for Civil Rights (OCR) by March 21, 1980 the methods of administration it would follow in carrying out its compliance

---

[40/] 34 C.F.R. §400.793.

[41/] 34 C.F.R. §400.774.

[42/] 34 C.F.R. §400.706.

[43/] Section 150 of the VEA (20 U.S.C. 2380); 34 C.F.R. §400.901-906.

[44/] This requirement was imposed by the Office for Civil Rights's "Guidelines for Eliminating Discrimination in Denial of Services on the Basis of Race, Color, National Origin, Sex and Handicapped." 44 F.R. 17162 (March 31, 1979).

responsibilities. The compliance program must include: (1) collecting and analyzing civil rights related data compiled by subrecipients; (2) conducting periodic compliance reviews of selected subrecipients; (3) providing technical assistance upon request to subrecipients; and (4) periodically reporting activities and findings to OCR.[45] OCR Guidelines identify the major decisions made by recipients applicable to the operation of vocational programs and then state that each decision must be made in a nondiscriminatory fashion. The major areas of decision include: (1) work study, cooperative vocational education programs, and apprenticeship programs; (2) admissions criteria; (3) additions and renovations to existing facilities; (4) public notification; (5) counseling; (6) recruitment; and (7) financial assistance.

3. Local Processes

The VEA and its regulations do not contain many provisions governing program operation at the local level. Two of the more significant provisions concern the submission of applications to the state and the requirements governing the composition of local advisory councils.

Eligible recipients seeking funds under the VEA must submit an annual application to the state. The application must meet six general criteria specified in the VEA. The criteria require that an application: (1) be developed in consultation with representatives of area educational and training resources;

---

[45] 44 F.R. 17165 (March 31, 1979).

(2) describe the vocational education needs of potential students; (3) indicate how and to what extent the needs of potential students will be met by the proposed programs; (4) describe how evaluation findings have been used in developing the proposed programs; (5) describe how the proposed programs related to CETA programs conducted by prime sponsors; and (6) describe the relationship between programs proposed to be conducted with VEA funds and other area vocational education programs supported by state and local funds.46/

Each local education agency or institution receiving VEA funds must establish a local advisory council on vocational education (LACVE). The LACVE must appropriately represent both sexes and racial and ethnic minorities served by the local education agency or institution.47/

D. Major Findings, Conclusions, and Recommendations

Problems of sex discrimination and sex stereotyping in vocational education have been severe, as indicated by the legislative history of the VEA. The declaration of purpose in the VEA provides that a purpose of the Act is "to furnish equal educational opportunities" by "overcom[ing] sex discrimination and sex stereotyping in vocational education programs."48/

Our task has been to analyze the clarity, consistency, adequacy, and necessity of the legal provisions designed to achieve the stated congressional purpose. We conclude that the

---

46/ Section 106(a)(4)(A)-(D) of the VEA (20 U.S.C. 2306(2)(4)(A)-(D)).

47/ 34 C.F.R. §400.111.

48/ Section 101 of the VEA (20 U.S.C. 2301).

sex equity mechanisms and processes Congress built into the Act do not ensure that all states will "take vigorous action to overcome sex discrimination and sex stereotyping in vocational education."[49]

The primary reason is that much is authorized, but little is required with respect to the expenditure of VEA funds to achieve sex equity in vocational education. The only expenditures specifically required are: (1) $50,000 for full-time sex equity personnel in each state, regardless of size, population, or the number of school districts, and (2) not less than an amount the state "deems necessary" for displaced homemakers and certain other special groups. A state does not have to spend VEA funds on grants to overcome sex bias and sex stereotyping or on supportive services for women or on other sex equity activities that are authorized, but not required. The legal provisions concerning sex equity in the VEA must be strengthened considerably if congressional intent with respect to "carry[ing] out all programs of vocational education in such a manner as to be free from sex discrimination and sex stereotyping" is to be realized.[50]

In reaching these conclusions, we examined the major sex equity mechanisms and processes in the VEA's legal framework. Set forth below are several general observations followed by a summary of our major findings, conclusions, and recommendations.

---

[49] H.R. (Conf.) Rep. No. 94-1701 at 213.

[50] *Id.*

1. General Observations

- Congressional purposes concerning sex equity in vocational education are unlikely to be achieved if statutory mechanisms for carrying out those purposes are unclear, inconsistent or inadequate.

- Clarity and consistency in the legal provisions for sex equity in the VEA are necessary, but not sufficient. Clear and consistent legal provisions in the VEA may be inadequate if they do not maximize the likelihood that Congressional intent with respect to sex equity in vocational education will be carried out.

- Deficiencies in the clarity, consistency, and adequacy of the legal framework for sex equity in vocational education only account for part of the inevitable implementation problems that occurred after the VEA was amended in 1976.

- State vocational education plans that repeat Federal requirements and that are assembled as compliance documents make it difficult to determine how Federal funds will be spent by local recipients to achieve sex equity in vocational education.

- A sex equity coordinator who must perform ten functions with very limited funds and little, if any, authority cannot realistically be expected to achieve sudden and significant change with regard to sex equity in vocational education.

- Authorizing the expenditure of Federal funds for sex equity in vocational education is unlikely to produce the desired results if state officials choose to expend only limited amounts of Federal funds for this purpose.

- A legal framework for sex equity in vocational education that does not require a local applicant to provide the state with any sex equity information in the local funding application does not give the state much leverage to insist on sex equity during the process of reviewing local applications.

- Federal tolerance of state noncompliance with the sex equity provisions of the Act is unlikely to ensure that Congressional purposes with respect to sex equity will be achieved.

2. Summary of Major Findings, Conclusions, and Recommendations

a. Mandatory expenditures for full-time sex equity personnel

A statutory requirement that Federal funds be used to support a sex equity coordinator at the state level is necessary if the functions assigned to the coordinator are to be carried out. There is evidence indicating that Federal funds would not be spent for this purpose in some states if it were not required. Mandatory expenditures for full-time sex equity personnel should continue if Congress wishes to overcome sex discrimination, bias, and stereotyping in vocational education.

The Tydings Amendment, which permits funds not obligated by the end of one fiscal year to be carried over for use in the next fiscal year, has undercut the requirement that states spend not less than $50,000 each fiscal year for full-time sex equity personnel. We recommend that the VEA be amended to provide expressly that the Tydings Amendment does not apply to the mandatory expenditure for full-time sex equity personnel under the VEA.

The uniform amount of $50,000 per state for full-time sex equity personnel makes little sense because it fails to take into account a state's size, population, and number of school districts. We recommend that this provision be amended to make the amount of VEA funds reserved for full-time sex equity personnel a function of the size of the state's allocation under the VEA, with $50,000 becoming the minimum amount every state must expend.

b. Mandatory expenditure for displaced homemakers and other special groups

The relationship between the requirements (1) that the state fund programs to "assess and meet the needs" of displaced homemakers and other special groups and (2) that the state expend not less than the amount it deems "necessary" is unclear. We recommend that the relationship between these requirements be clarified.

c. Authorized uses of funds

The requirement that all state contracts for exemplary and innovative projects give "priority" to programs and projects designed to reduce sex bias and sex stereotyping in vocational education is unclear. We recommend that there be clarification of how states are to give such projects priority.

d. Functions of the sex equity coordinator

There is overlap among the ten functions sex equity coordinators must perform. The ten functions can be reorganized and consolidated into five functions without losing any functions. We recommend that this be done.

There are no clear standards concerning adequate performance of each of the functions the sex equity coordinator must perform. We recommend that such standards be developed.

e. Policies for eradicating sex bias(including incentives)

The provision requiring that the state provide incentives for eligible recipients: (1) to encourage the enrollment of both men and women in non-traditional courses; and (2) to develop model programs to reduce sex bias and sex stereotyping is unclear and inadequate. Publicity and plaques have not proven to be effective incentives. Two forms of incentives appear to be effective: (1) a set-aside of funds; and (2) giving priority to local applications proposing to address sex equity concerns. If Congress is interested in effective incentives, we recommend that Congress adopt either or both of these forms of incentives.

f. Results of policies and activities

The requirement that states report in their annual plan the "results" of compliance with the five-year state plan's equal access policies and procedures appears to be unclear because most states are reporting activities rather than results. We recommend that "results" be defined in outcome or impact terms and that the state's obligation to report "results" in such terms be clarified.

g. Local policies

The present criteria for local applications are inadequate because they do not require that a local application provide the state with any information concerning the sex equity situation and activities. We recommend that local applications be required to contain such information.

II. Mandatory Expenditures of VEA Funds

A. Introduction

This part of the chapter concerns the two provisions governing the mandatory expenditure of VEA funds for sex equity: (1) the requirement that a state spend not less than $50,000 in each fiscal year for full-time sex equity personnel and (2) the requirement that a state spend not less than an amount it deems necessary to assess and meet the needs of displaced homemakers and certain other special groups.

B. $50,000 for Full-Time Personnel

1. Description

The VEA requires that any state participants in programs authorized under the Act assign "such full-time personnel as may be necessary to assist the State Board in fulfilling the purposes of the Act."[51] The regulations describe the "purposes of the Act" as: (1) furnishing equal educational opportunities in vocational education programs to persons of both sexes, and (2) eliminating sex discrimination and sex stereotyping from all vocational education programs.[52] Persons designated to assist State Boards in accomplishing these purposes must work full-time to perform several functions specified in the VEA.[53]

The state is required to spend "not less than $50,000" each year of its basic grant funds to support the activities of the personnel working full-time to carry out these functions.[54] The states have been instructed that although $50,000 is the minimum amount required to be reserved from subpart 2 funds (basic grants), that amount can be augmented with regular subpart 2 funds or with state administration monies. The additional funds, however, are subject to the relevant matching requirements of the part or purpose from which the excess funds originated. A policy memorandum explains this:

---

[51] Section 104(b) of VEA (20 U.S.C. 2304(b)).

[52] 34 C.F.R. §400.72.

[53] The functions the full-time personnel must perform are described *infra*, at 46.

> It is permissible to augment the $50,000 minimum amount required to be reserved from subpart 2 funds for full-time sex equity personnel and related functions with funds from regular subpart 2 funds or from state administration monies. The amount in excess of $50,000 in either case is subject to the relevant matching requirements of the part or purpose from which the excess monies originate. Excess funds taken from subpart 2 require overall matching rather than matching by purpose, whereas excess funds taken from state administration require matching by that purpose. [55]

The regulations instruct the states that the $50,000 required to be set aside shall be used for: (1) salaries for full-time professional staff; (2) salaries for support staff; and (3) travel and other expenses directly related to the support of personnel in carrying out its required functions.[56]

---

[54] Section 104(b) and §120 of VEA (20 U.S.C. 2304(b) and 2330); 34 C.F.R. §400.74. The comments to the regulations indicate that the $50,000 is a minimum and not a maximum: "there is nothing in the Act to prevent a State from spending more than $50,000 to support the full-time personnel, but a State may not spend less than that amount. To emphasize this point, the language of the regulation has been amended to read 'not less than' $50,000." 42 F.R. 53868.

[55] Policy Memorandum BOAE/DSVPO FY 79-6 (May 2, 1979).

[56] 34 C.F.R. §400.74.

If a state fails to obligate all of the $50,000 by the end of the fiscal year, the Office of General Counsel (OGC) is of the opinion that the Tydings Amendment permits a state to carry forward into the next fiscal year any portion of the $50,000 reserved for "full-time personnel" which is unobligated at the end of the fiscal year.[57] OGC explained that Senator Tyding's purpose in 1970 when he proposed this amendment was:

> To allow State and local school officials ample time in which to plan for and carry out the efficient expenditure of federal education funds. Because of the delays in the passage of annual appropriation bills, such officials used to have only the last 4 or 5 months in a fiscal year in which they would know the amount of federal assistance they could expect for that year. The fact that unexpended funds would revert to the treasury at the end of the fiscal year often caused local officials to make inefficient or wasteful expenditures in order to avoid losing the money altogether. (103 CONG REC. 1240, Feb. 4, 1970.) [58]

After reviewing the purpose of the amendment, OGC concluded that "any portion of the $50,000 reserved for the purposes of section 104(b) of the VEA for one fiscal year which is unobligated may be carried forward into the succeeding fiscal year."[59] However, OGC cautioned that use of the Tydings Amendment to carry over part of the $50,000 for full-time personnel would not excuse the state's failure to perform the required functions.

---

[57] OGC Legal Memorandum, December 6, 1978 (Legal Opinions Handbook at 159).

[58] The Tydings Amendment (Section 412(b) of GEPA (20 U.S.C. 1225(b)) states:

> Not withstanding any other provision of law, unless enacted in specific limitation of the provision of this subsection, any funds from appropriations to carry out any programs to which this Title is applicable during any fiscal year ... which are not obligated and expended by educational agencies or institutions prior to the beginning of the fiscal year succeeding the fiscal year for which such funds were appropriated shall remain available for obligation and expenditures by such agencies and institutions during such succeeding fiscal year.

[59] Id.

> Although this result is likely to be beneficial to those States which experience difficulty in gearing up for the section 104(b) requirements, it does not relieve the States from their responsibility of carrying out each function each year. 60/

> Failure to appropriately obligate this amount over the Tydings period translates into a violation of the Act, regulations, and each State's assurance in its State plan. 61/

2. Findings, Conclusions, and Recommendations

This section presents findings, conclusions, and recommendations with respect to: (a) the effect of the Tydings Amendment; (b) the necessity for a mandatory expenditure; and (c) the effect of a uniform dollar amount for all states.

(a) The effect of the Tydings Amendment--Two of the four states included in the study spent less than $50,000 in one fiscal year (FY 78) and carried the balance forward to the succeeding fiscal year. These facts were revealed by MERC/Qs

---

60/ *Id.* at 160.

61/ The same OGC legal memorandum spelled out the consequences of failing to obligate during the Tydings period that portion of the $50,000 that was carried over:

> Our understanding of BOAE policy on this matter has been and continues to be that unobligated set-asides funds (*i.e.*, $50,000) lapse in revert to the Federal Treasury. In addition to this penalty, the VEA and GEPA provide a legal basis for other penalties whenever the Commissioner finds that there is a failure to comply substantially with the provisions of the Act. BOAE is currently studying the feasibility of resorting to withholding of funds in whole or in part, suspension and termination procedures, and cease and desist orders. In sum, the only relief a State can expect would appear to be a legislative exemption from the $50,000 requirement since the Commissioner lacks legal authority to waive this requirement.

completed in 1979, one of which indicated that a state had carried forward almost $40,000, "as allowed by the Tydings Amendment." Vocational education officials in these states indicated that although the requirement to spend "no less than" $50,000 to support the activities of the "full-time personnel" was unambiguous, the real effect of the Tydings Amendment was to allow a state to expend less than $50,000 a year.

As a result of these findings, we conclude that the legal provision requiring that a state spend "not less than" $50,000 each year of its basic grant funds for "full-time personnel" is clear. However, it is not clear that Congress intended to permit states to offset this mandate by the Tydings Amendment which permits a state to spend less than $50,000 per year and carry over the unexpended amount to the next fiscal year. We recommend that the VEA be amended to provide that the Tydings Amendment does not apply to the mandatory expenditure for "full-time personnel" required by the VEA.

(b) The necessity for a mandatory expenditure--State officials responsible for sex equity in vocational education struck a common theme in interviews: Absent a requirement for mandatory expenditures for full-time personnel, there would be, in some states, little, if any, state money spent to support full-time personnel working on problems of sex bias, sex stereotyping, and sex discrimination in vocational education. In other states, respondents indicated, there would be no state funds expended for such purposes if the VEA did not require it. Sex equity coordinators in the states included in the study believe that a legislative provision mandating expenditures for full-time sex equity personnel is necessary if the **Federal** government wants the present activities of the sex equity coordinators to continue.

We conclude that a statutory provision mandating the expenditure of funds for "full-time personnel" for sex equity is necessary if the statutory purpose of furnishing equal educational opportunities in vocational education programs to persons of both sexes and eliminating sex discrimination and sex stereotyping for all vocational education programs is to be achieved. We recommend that the mandatory expenditure of VEA basic grant funds for full-time personnel to address sex equity problems in vocational education be retained and that the sanction for failure to satisfy the mandatory expenditure requirement be sufficient to deter noncompliance. This would mean, for example, that OVAE seek a cease and desist order from the Education Appeals Board or seek withholding of general funds for administration.

(c) The effect of a uniform dollar amount for all states--State vocational education officials interviewed questioned the adequacy of the legislative provision mandating that each state spend "no less than" $50,000 to support the activities of the "full-time personnel." They indicated that the set amount failed to take into account differences among states, such as the size and population of states, as well as the number of school districts.

Given the broad sweep of the ten mandated functions of the "full-time personnel," sex equity coordinators interviewed thought the amount of $50,000 per year was insufficient, particularly when they are expected to perform each of the functions each year. Sex equity coordinators interviewed indicated that an alternative to the set amount of $50,000 per state should be devised to recognize the differences among states.

We conclude that the uniform dollar amount of $50,000 per state does not make sense because it fails to take into account such critical differences among the states as size, population, and number of school districts. We recommend that the VEA be amended to provide that the mandatory expenditure for sex equity should be a function of the size of the Federal VEA allocation to the state, with every state required to expend at least $50,000.

C. Displaced Homemakers and Other Special Groups

1. Description

A state must use funds under its basic grant to provide vocational education programs for displaced homemakers and other special groups, including: (1) persons who had been homemakers but who now, because of dissolution of marriage, must seek employment;[62] (2) persons lacking adequate job skills who are single heads of households; (3) persons who are currently homemakers and part-time workers but who wish to secure a full-time job; and (4) women and men in jobs traditionally considered jobs for persons of their sex and who wish to seek jobs traditionally thought of as jobs for the opposite sex.[63]

A minimum expenditure, not defined as an amount of dollars, is required for such programs. A state must expend not less than the amount "it deems necessary for each fiscal year from the funds available under the basic grant ... for special programs and placement services which are tailored to meet the needs" of displaced homemakers and other special groups.[64]

In accordance with policies and procedures in its five-year state plan, the state must fund "programs ... to assess and meet the needs" of displaced homemakers and other special groups.[65] According to OGC, an assessment of needs without special courses would not meet the requirement.

---

[62] The comments to the regulations state: [t]he term 'dissolution of marriage' is not to be interpreted only in the strict sense of divorce. Vocational training is available to the homemaker who has experienced a separation, annulment or any other type of dissollution of marriage." 42 F.R.53883.

[63] Section 120(b)(1)(L) of VEA (20 U.S.C. 2330(b)(1)(L); 34 C.F.R. §400.621.

[64] 34 C.F.R. §400.502(b). The comments to the regulations indicate that subpart 3 funds for program improvement and support services may not be used to meet the requirement for use of subpart 2 funds for displaced homemakers and other special groups. 42 F.R. 53866.

[65] 34 C.F.R. §400.622. See 34 C.F.R. §400.187(b).

> It is our view that a needs assessment of these target populations does not satisfy either the statutory or regulatory requirement for special courses of vocational education which offer special instruction in how to seek employment. This view, however, would not stop the States from supplementing their course offerings with a needs assessment. [66]

The programs must include (1) "special" courses for these persons to learn how to seek employment, and (2) placement services for these persons once they complete the vocational education program.[67] In addition, these programs must include organized educational programs necessary to prepare these special groups for employment, including acquisition, maintenance, and repair of instructional equipment.[68]

A policy memorandum issued by BOAE clarifies the options available to states regarding the design of programs. The memorandum makes three points. First, states may mainstream the special groups so long as the programs in which they are mainstreamed satisfy the requirements described above. Second, the overall program developed by the state should address how the following needs will be met: (a) needs for vocational instruction; (b) needs for instruction in how to seek employment; and (c) needs for placement services. Third, if the individuals to be served are either disadvantaged or have other needs which reveal themselves in assessment, then tuition support, among other things, should be considered as an appropriate mechanism for meeting those needs. States should encourage the marshalling of resources from other sources before using VEA funds.[69]

---

[66] OGC Legal Memorandum, Legal Opinions Handbook at 161. A state may not satisfy the requirements for "special" courses or instruction by providing regular vocational education programs without special courses or instruction in how to seek employment for displaced homemakers and other special groups. 42 F.R. 53866 (Q & A No. 29).

[67] 34 C.F.R. §400.622(b).

[68] 34 C.F.R. §400.622(a).

2. Findings, Conclusions and Recommendations

State vocational education officials interviewed expressed different understandings of the extent of the obligation, i.e., they were unclear about the relationship between (1) the requirement for a state to spend "not less than the amount it deems necessary"[70] and (2) the requirement that the state must fund "programs ... to assess and meet the needs" of displaced homemakers and other special groups.[71] An exchange of correspondence between BOAE and a State Director of Vocational Education illustrates the problems one state encountered in this respect.

An April, 1979 BOAE's letter to the State Director first criticized the lack of progress and demanded remedial action.

---

[69] Policy Memorandum BOAE/DSVPO FY 79-5 (April 30, 1979).

[70] 34 C.F.R. §400.502(b).

[71] 34 C.F.R. §400.662.

> According to the annual plan, programs for displaced homemakers are still in the assessment and planning stage. There are no organized programs to prepare groups for employment; special courses on how to seek employment; and provision of placement service, as the regulation requires.
>
> Action Required:
>
> Revision to the plan describing the courses and services funded to date to fulfill the requirements of the regulation.

A subsequent BOAE letter in September, 1979 expressed continuing dissatisfaction with the state's "general confusion surrounding the use of money for displaced homemakers" and again demanded remedial action.

> [The state's] response. . .fails to provide the requested remedial action. The response. . . simply repeats the FY 79 plan's objective for displaced homemakers and other special groups: to determine the number of individuals involved and the types of programs requested. By FY 79 . . .states should have funded the mandated activities required by the Act. Yet it is still unclear if the state funded organized programs to prepare these groups for employment; special programs on how to seek employment and/or placement services were not mentioned in FY 79.
>
> Based on the above and the review of the FY 80 plan, the. . .program for displaced homemakers and other special groups still needs extensive clarification. . . .There is general confusion surrounding the use of money for displaced homemakers in that the FY 80 plan never described the specific programs for displaced homemakers, and it is not even clear that the. . .program for displaced homemakers is beyond the assessment stage in FY 80.
>
> Required Action
>
> The state must specify in the FY 80 plan exactly from what source(s) money for programs for

> displaced homemakers is derived and what, if any, actual services (see section 104.622) are being provided to the populations described in 104.621. . .

Similar observations were noted in the quality review of the state's FY 80 plan.

> We are concerned that [the state] is still at the stage of identifying displaced homemakers. The state should have completed such assessments by now and be describing substantive programs for displaced homemakers. The accountability report describes no results or benefits to the displaced homemakers or the other special groups.

The State Director responded to BOAE in October, 1979 by saying that the state's preliminary assessment showed separate programs were not needed for displaced homemakers.

> The assessment conducted during FY 1978 and 1979 indicated that the need for separate vocational education programs does not exist. The assessment indicated that the displaced homemakers and other special groups were being served in existing vocational education programs. The [$20,000] . . .is to provide for additional services and activities within existing programs for this special group.

The State Director went on to say that state would try to identify displaced homemakers in regular programs and assess their "additional" needs.

> During FY 1980, we are attempting to identify the displaced homemakers and other special groups which are currently being served in existing programs. In order to be accountable through the reporting system, program deliverers have been contacted in an attempt to collect information concerning the programs, services and activities currently provided for this group and an assessment to determine the additional needs which are not being met.

The displaced homemaker's section of this state's 1980-81 annual program plan indicates that it is still assessing the needs of displaced homemakers. The plan contains the following objectives.

- to determine the number of displaced homemakers and other special groups in need of vocational training programs pursuant to the Act;
- to determine the status or training programs, services and activities presently provided for displaced homemakers and other special groups; and
- to determine the types of additional training programs, services and activities necessary to meet the needs of displaced homemakers and other special groups pursuant to the Act.

Based on the above findings, we conclude that the scope of the obligation to fund programs to "assess and meet the needs" of displaced homemakers at a level the state "deems necessary" is unclear because it is interpreted differently among the states in the study. Further, the mandate to "assess ... the needs" of displaced homemakers is inadequate because it lacks standards to determine what constitutes an acceptable needs assessment.

We recommend that (1) the scope of the state's obligation to assess and meet the needs of displaced homemakers and to fund programs at the level the state "deems necessary" be clarified, and (2) standards be developed to indicate what constitutes a satisfactory assessment of the needs of displaced homemakers and other special groups.

III. Authorized Uses of Funds

A. Introduction

This part discusses authorized uses of funds for sex equity under subpart 2 (basic grants) and under subpart 3 (program improvement and supportive services).

B. Authorized Uses Under Subpart 2

1. Description

a. Support services for women--A state may use funds under its basic grant for support services for women who enter vocational education programs designed to prepare individuals for employment in jobs which have been traditionally limited to men when such services are described in its approved five-year state plan and annual program plan.[72] Support services to be provided include: counseling, job development, and job follow-up support.

> The scope of counseling services includes:
>
> Counseling women entering and enrolled in non-traditional programs on the nature of these programs and on the ways of overcoming the difficulties which may be encountered by women in these programs. Counselors may furnish supportive services to assist students in adjusting to the new employment requirements.[73]

---

[72] Section 120(b)(1)(J) of VEA (20 U.S.C. 2330(b)(1)(J)); 34 C.F.R. §400.601-603; and §400.502(i)(9).

[73] 34 C.F.R. §400.602(a).

Job development services are described in the regulations as follows.

> Programs and activities in the area of job development include the provision of materials and information concerning the world of work which present women students entering, enrolled in, or interested in nontraditional programs the options, opportunities, and range of jobs available in these nontraditional fields. Job development support services may also be carried out through bringing persons employed in these nontraditional fields into the schools, as well as providing opportunities for women students to visit the work place of business and industry so as to afford them a clear understanding of the nature of the work, including an understanding of the work setting in which these jobs are performed.[74/]

> Job follow-up support services
>
> may be provided to assist women students in finding employment relevant to their training and interests. Follow-up services may be provided to assist students in the work force, and dealing with barriers which women face in working in these nontraditional areas.[75/]

In addition, funds may be used to increase the number of women instructors involved in the training of individuals in programs which have traditionally enrolled mostly males "so as to provide supportive examples for these women who are preparing for jobs."[76/]

[74/] 34 C.F.R. §400.602(b).

[75/] 34 C.F.R. §400.602(c).

[76/] 34 C.F.R. §400.603.

The comments to the final regulations emphasize the importance of support services in realizing congressional intent with respect to sex equity.

> One of the major conclusions reached by Congress during its two years of hearings on the Vocational Education Act is that the inferior position which women now hold in the labor market is reinforced by the type of training programs available to and selected by them. Consequently, the legislation was drafted in a way to attempt to solve the problem. One of the key provisions on this matter incorporated into the Act was the section 120(b)(i)(j) program of support services for women.[77]

b. Day care services--A state may use funds under its basic grant to provide day care services for children of students (both male and female and including single parents) in secondary and post-secondary vocational education programs, when such services are included in the approved five-year state plan and annual program plan.[78]

Day care services must be for the purpose of providing appropriate care and protection of infants, pre-school and school age children in order to afford students who are parents the opportunity to participate in vocational education programs.[79]

The question and answer section following the regulations explains that day care centers may be established in the schools and may serve as a learning laboratory for training students in employment in child care occupations.[80/] Day care programs funded under subpart 2 are governed by the Federal Interagency Day Care requirements (45 C.F.R. Part 71).[81/]

---

[77] 42 F.R. 53882.

[78] Section 120(b)(1)(K) of VEA (20 U.S.C. 2330(b)(1)(K)); 34 C.F.R. §400.611-612 and 34 C.F.R. §400.502(c)(10).

[79] 34 C.F.R. §400.612(a).

2. Findings, Conclusions, and Recommendations

State vocational education administrators interviewed indicated that the statutory and regulatory provisions concerning the uses of funds under subpart 2 for support services for women and for day care services were clearly understood and posed no interpretive problems. There was no uncertainty about whether basic grant funds could be used for counseling, job development, job follow-up support, and increasing the number of women instructors in programs enrolling mostly males.

Sex equity coordinators interviewed emphasized the necessity for support services and day care services, but questioned whether states allocated a sufficient amount of funds for these purposes.

Based on the above findings, we conclude that the legal provisions authorizing the use of subpart 2 funds for support services for women and for day care services are clear and are necessary.

Since the authority to use subpart 2 funds for support services for women and for day care services is clearly understood, and is necessary, we do not recommend changes to the legislation or the regulations in this respect. To the extent

---

[80/] 42 F.R. 53866.

[81/] 34 C.F.R. §400.612(b).

that Congress wishes to increase the amount of basic grant funds being allocated by the states to support services for women and to day care services Congress should require rather than permit funding for this purpose.

C. Authorized Uses Under Subpart 3

1. Description

Subpart 3 funds can be used for program improvement and supportive services.

a. Supportive services--Subpart 3 authorizes the funding of specified supportive services; namely, vocational guidance and counseling, vocational education personnel training, state and local administration and grants to overcome sex bias and sex stereotyping. The House Report explains that the support services described above are the only supportive services authorized under subpart 3. This limitation is "meant to achieve greater accountability for the use of funds by providing specific authority for them with resulting reporting on their use and by eliminating any general or vague authority for activities."[82/] The House Report also explains that all of the above supportive services are authorized, but not required, except vocational guidance and counseling which must be funded to a certain extent.[83/]

- Guidance and Counseling -- The state must use not less than twenty percent of the Federal funds available under subpart 3 to support vocational development guidance and coun-

---

[82/] H.R. Rep. No. 94-1085 at 44-45.

[83/] Id.

seling programs, services, and activities.[84/] The expenditure of funds for this purpose must be in accordance with the approved five-year state plan and annual program plan. Subpart 3 funds made available to a state for vocational guidance and counseling must be used to support one or more of the following eight activities:

> (1) initiation, implementation and improvement of high quality vocational guidance and counseling programs and activities;
>
> (2) vocational counseling for children, youth, and adults, leading to a greater understanding of educational and vocational options;
>
> (3) provision of educational and job placement programs and follow-up services for students in vocational education and for individuals preparing for professional occupations or occupations requiring a baccalaureate or higher degree. Follow-up services provided to baccalaureate or higher degree students must be only for students enrolled on or after October 1, 1977;
>
> (4) vocational guidance and counseling training designed to acquaint guidance counselors with (1) the changing work patterns of women, (2) ways of effectively overcoming occupational sex stereotyping, and (3) ways of assisting girls and women in selecting careers solely on their occupational needs and interests, and to develop improved career counseling materials which are free;
>
> (5) vocational and educational counseling for youth offenders and adults in correctional institutions;
>
> (6) vocational guidance and counseling for persons of limited English-speaking abilities;

[84/] Section 134(a) of VEA (20 U.S.C. 2354(a)); 34 C.F.R. §400.762(a).

(7) establishment of vocational resource centers to meet the special needs of out-of-school individuals, including individuals seeking second careers, individuals entering the job market late in life, handicapped individuals from economically depressed communities or areas, and early retirees; and .

(8) leadership for vocational guidance and exploration programs at the local level.[85]

Recipients of funds allocated by the state for programs, services, and activities listed in (1) and (2) above, must use these funds, insofar as is practicable:

(a) to bring individuals with experience in business and industry, the professions, and other occupational pursuits into schools as counselors or advisors for students;

(b) to bring students into the work establishments of business and industry, the professions, and other occupations to acquaint students with the nature of work accomplished therein; and

(c) to enable guidance counselors to obtain experience in business and industry, the professions, and other occupational pursuits which will better enable those counselors to carry out their guidance and counseling duties.[86]

- Personnel training--The state may use subpart 3 funds to support vocational education personnel training programs.[87] The purpose of vocational education personnel training is to improve the state's vocational education programs and the services which support those programs by improving the qualifications of persons serving or preparing to serve in vocational education programs.[88]

---

[85] Section 134(a) of VEA (20 U.S.C. 2354(a)); 34 C.F.R. §400. 762(a)-763.

[86] Section 134(b) of VEA (20 U.S.C. 2354(b)); 34 C.F.R. §400.764.

[87] Section 135 of VEA (20 U.S.C. 2355); 34 C.F.R. §400.772.

[88] Id.; 34 C.F.R. §400.771.

To be eligible for support, specific training programs and projects must be in accordance with the general plan for vocational education personnel training as set forth in the approved five-year state plan and annual program plan for vocational education.[89]

The State Board may make grants or contract, in accordance with its five-year state plan and annual program plan, in support of both training and retraining programs and projects to provide:

(1) both pre-service and in-service education; and

(2) both regular session (academic year) institutes and short-term institutes. [90]

Training may be provided to persons serving or preparing to serve in vocational education programs, including teachers, administrators, supervisors, and vocational guidance and counseling personnel.[91] Within limits set out in the regulations, eligible participants may receive stipends and allowances for other expenses.[92]

The VEA and implementing regulations list a number of examples of the types of training programs which may be supported under subpart 3. The list includes, for example,

---

89/ Section 130(b) of VEA (20 U.S.C. 2350); 34 C.F.R. §400.772.

90/ Section 134 of VEA (20 U.S.C. 2355); 34 C.F.R. §400.775.

91/ *Id.*; 34 C.F.R. §400.773.

92/ *Id.*; 34 C.F.R. §400.776.

training or retraining in vocational education in new and emerging occupations and in-service training to overcome sex stereotyping in vocational education programs.[93]

Grants to overcome bias and sex stereotyping-

Subpart 3 funds can also be used for grants to overcome sex bias and sex stereotyping.[94]

The expenditure of funds for this purpose must be in accordance with the approved five-year state plan and annual program plan.[95] The plans must describe the types of projects to be funded.

The regulations provide examples of the type of projects that may be funded.

- Research projects on ways to overcome sex bias and sex stereotyping in vocational educational programs;
- Development of curriculum materials free of sex stereotyping;
- Development of criteria for use in determining whether curriculum materials are free from sex stereotyping;
- Examination of current curriculum materials to assure that they are free of sex stereotyping; and
- Training to acquaint guidance counselors, administrators, and teachers with ways of effectively overcoming sex bias and sex stereotyping, especially in assisting persons in selecting careers according to their interests and occupational needs rather than according to stereotypes.[96]

---

[93] Id.; 34 C.F.R. §400.774.

[94] Section 136 of VEA (20 U.S.C. 2356); 34 C.F.R. §400.791.

[95] Section 130(b) of VEA (20 U.S.C. 2350(b)); 34 C.F.R. §400.792.

[96] 34 C.F.R. §400.792(a)-(e).

The comments to the regulations indicate that other types of projects may be funded, and that, insofar as "programs to overcome sex bias" fall into the category of "support or improvement of vocational education programs," they may be funded.[97]

b. Program improvement -- Subpart 3 funds for program improvement may be used for research, exemplary and innovative programs, and curriculum development. To expend subpart 3 funds for program improvement, a state must establish a Research Coordinating Unit (RCU).[98] With respect to research, a RCU may use subpart 3 funds directly or by contract for : (1) applied research and development in vocational education; (2) experimental, developmental, and pilot programs and projects designed to test the effectiveness of research findings, including programs and projects to overcome problems of sex bias and sex stereotyping; (3) improve curriculum materials for presently funded programs in vocational education and new curriculum materials for new and emerging job fields, including a review and revision of any curricula developed with subpart 3 funds to ensure that such curricula do not reflect stereotyping based on sex, race or national origin; (4) projects in the development of new careers and occupations; and (5) dissemination of the results of the contracts.[99]

---

[97] 42 F.R. 53885.
The comment states:

> The activities listed in §400.703 are intended to be examples, and the list is not exhaustive. Section 130 of the Act, which authorizes grants to overcome sex bias and sex stereotyping, falls under subpart 3, Program Improvement and Supportive Services; therefore, funds used under this section must go for support or improvement of vocational education programs. Insofar as programs to overcome sex bias faill into this category, they may be supported by funds under this section.

[98] 34 C.F.R. §400.703(a).

With regard to exemplary and innovative programs the RCU may use subpart 3 funds directly by contract for:

(1) programs to develop high quality vocational education programs for urban centers with high concentrations of economically disadvantaged individuals; unskilled workers; and unemployed individuals;

(2) programs to develop training opportunities for persons in sparsely populated rural areas; and individuals migrating from farms to urban areas;

(3) programs of effective vocational education for persons of limited English-speaking abilities;

(4) establishment of cooperative arrangements between public education and manpower agencies, designed to correlate vocational education opportunities with current and projected needs of the labor market;

(5) programs designed to broaden occupational aspirations and opportunities for youth, or youth who have academic, socio-economic, or other handicaps; and

(6) dissemination of these contracts.[100]

However, all RCU contracts for exemplary and innovative projects must:

(1) give priority to programs and projects designed to reduce sex bias and sex stereotyping in vocational education; and

---

[99] Section 131(a) of VEA (20 U.S.C. 2352); 34 C.F.R. §400.75.

[100] Section 132(a) of VEA (20 U.S.C. 2352(a)); 34 C.F.R. §400.706(a).

(2) make provision for the participation of students enrolled in private non-profit schools, and also ensure that Federal funds will not be commingled with state or local funds. 101/

The state must indicate in the annual program plan and accountability report covering the final year of financial support by the state for any examplary and innovative program:

(1) the proposed disposition of the program when Federal support ends; and

(2) the means by which successful or promising programs will be continued and expanded within the state. 102/

2. Findings, Conclusions, and Recommendations

State vocational education officials interviewed indicated that the legal provisions concerning supportive services (guidance and counseling, personnel training, and grants to overcome sex bias and sex stereotyping) were generally clear to them, i.e., they understood what was authorized with respect to the funding of different types of projects.

In the program improvement area, however, there was uncertainty regarding the requirement that all RCU contracts for exemplary and innovative projects must "give priority to programs and projects designed to reduce sex stereotyping in vocational education" (Section 132(b) of the VEA; 34 CFR §104.706(b)(1)). The interpretive issue concerned the meaning of the term "give priority". State vocational education

---

101/ Section 132(b) of VEA (20 U.S.C. 2352(b)); 34 C.F.R. §400. 706(b).

102/ Section 132(c) of VEA (20 U.S.C. 2352(c)); 34 C.F.R. §400. 707.

officials indicated that they understood the intent clearly, but did not understand whether there was any one best way to realize that intent. In none of the states visited was there a clear written policy defining what it meant to "give priority". One state's approach involved having the sex equity coordinator review every draft request for a proposal and sit on review committees scoring proposals submitted for contracts for exemplary or innovative programs. Another state was unable to explain how it gave "priority" to programs designed to reduce sex bias and sex stereotyping when it awarded contracts for examplary or innovative programs. A state official in a different state candidly admitted that "no real preference" was given to programs designed to reduce sex bias and sex stereotyping.

Based on the above findings, we conclude that (1) the legal provisions authorizing the use of subpart 3 funds for supportive services are clear, and (2) the requirement that every contract for exemplary or innovative programs using program improvement funds under subpart 3 must "give priority to programs to reduce sex bias and stereotyping" is ambiguous and is interpreted differently by different states. We recommend that the ambiguous meaning of "give priority to programs designed to reduce sex bias and stereotyping" be clarified so that states will understand clearly what is expected of them in terms of awarding contracts for exemplary or innovative programs using program improvement funds under subpart 3.

IV. State Policies and Activities

A. Introduction

This part discusses certain state policies and activities concerning sex equity. Included among these are: (1) the functions of the full-time sex equity personnel; (2) policies for eradicating sex bias (including incentives); (3) descriptions of the uses of funds in state planning documents; and (4) descriptions of the results of state policies and activities in state planning documents.

B. The Functions of the Full-Time Sex Equity Personnel

1. Description

Persons designated to assist State Boards in furnishing equal educational opportunities in vocational education programs to persons of both sexes and in eliminating sex discrimination and sex stereotyping in all vocational education programs must perform the following functions specified in the VEA:

> (1) take such action as may be necessary to create awareness of programs and activities in vocational education that are designed to reduce sex stereotyping in all vocational education programs;
>
> (2) gather, analyse, and disseminate data on the status of men and women, students, and employees in the vocational education programs of that state;
>
> (3) develop and support actions to correct any problem brought to the attention of such personnel through activities carried out under (2);
>
> (4) review the distribution of grants by the State Board to assure that the interests and needs of women are addressed in the projects assisted under the Act;

(5) review all vocational education programs in the state for sex bias; 103/

(6) monitor the implementation of laws prohibiting sex discrimination in all hiring, firing, and promotion procedures within the state relating to vocational education;

103/ OGC interprets this provision as requiring a comprehensive review of all programs and suggests that the requirement could be met if the state reviewed local applications against standards and criteria designed by the sex equity coordinator. The OGC opinion states:

> The language of the above quoted regulation requiring a review of all programs is derived verbatim from Section 104(b)(1)(E) of the VEA. The legislative history of the VEA also emphasizes that the full-time personnel must review the progress of the State in eliminating sex bias and sex stereotyping in all vocational education programs. (House Report 94-1085). Thus, it is readily apparent that Congress intended a comprehensive review of programs rather than a cursory review or one conducted on a sampling basis.
>
> The burden imposed by this requirement on the full-time personnel from the more populated states undoubtedly causes concern. For instance, how can the coordinator from California or New York possibly review all of the vocational programs in the State each year? We would suggest in response to this problem that if a State lacks sufficient personnel or resources to conduct a review of all programs, the full-time personnel should be encouraged to implement a management system whereby the State, during its approval process of local applications, would examine each local application in accordance with the standards and criteria designed by the full-time personnel. This process would, in our view, assure that each program funded in whole or in part by the State took into account the full-time personnel's mission of reviewing all programs to eliminate sex bias.

Legal Opinions Handbook at 160.

(7) review and submit recommendations with respect to the overcoming of sex stereotyping and sex bias in vocational education programs for the five-year state plan and its annual program plan; 104/

(8) assist local educational agencies and other interested parties in the state in improving vocational education opportunities for women;

(9) make readily available to the State Board, the state and national advisory councils on vocational education, the state commission on the status of women, the commissioner, and the general public, information developed as a result of carrying out the duties of the full-time personnel; 105/

The VEA regulations added a tenth function:

(10) review the self-evaluations required by Title IX. 106/

104/ Section 104(b)(1)(G) of the VEA (20 U.S.C. 2304(b)(1)(G)) requires a review of the annual program plan and accountability report. 34 C.F.R. §400.75(j) requires that the five-year plan and annual program plan be reviewed (with recommendations) "prior to their submission to the [Secretary] for approval," but neglects to include a review of the annual accountability report, which is required by the Act.

105/ Section 104(b)(1) of VEA (20 U.S.C. 2304(1); 34 C.F.R. §400.75. The regulations frequently use the terms "sex discrimination," "sex bias," and "sex stereotyping." These terms are defined in 34 C.F.R. §400.73.

106/ 34 C.F.R. §400.75(i). The Secretary of Education has proposed that the Title IX self-evaluation function be deleted from the VEA regulations.

A requirement to create "awareness of the Title IX compliant process" was also added in the regulation.[107]

The state is required to select full-time professional personnel by matching the qualifications of the applicants with the responsibilities of the job.[108] The state must have at least one professional working full time to eliminate sex bias and sex stereotyping in vocational education.[109] It is unacceptable to employ personnel full time who work less than full time on the elimination of sex bias.[110] The personnel hired do not have to be directly employed by the State Board.[111] For example, the State Board may contract for personnel to assist the State Board so long as the contract specifies that the personnel work full time to eliminate sex discrimination and sex stereotyping.[112]

A state is not free to pick and choose among the functions each year. There must be annual activity for each function. An OGC opinion explains:

> Unless there is activity annually in all ten functions enumerated in Section 104.75(a) through (j), the State will be considered as being in substantial non-compliance and subject to either a suspension or termination of Federal payments in accord with Section 109(c) of the Act. 113/

107/ 34 C.F.R. §400.75(c).

108/ 34 C.F.R. §400.72(b).

109/ *See* 34 C.F.R. §400.72 and §400.75.

110/ 42 F.R. 53868.

111/ H.R. (Conf.) Rep. No. 94-1071 at 215; 42 F.R. 53865.

112/ *Id.*

113/ OGC Legal Opinion (January 5, 1977).

The regulations provide that the $50,000 set aside to carry out the ten functions must be used for:

(1) Salaries for full-time professional staff;

(2) Salaries for support staff; and

(3) Travel and other expenses directly related to the support of personnel in carrying out the functions. 114/

A BOAE memorandum indicates that no Federal requirements say how much of the $50,000 reserved for the sex equity coordinator must be allocated to particular functions, but that states may supplement the $50,000 from certain other sources.

> Since each of the ten functions must be carried out each year, the State must decide on the amount of funds to be spent for any particular activity. If the $50,000 figure is insufficient to perform all ten functions, the State may supplement this funding level with (1) Federal, State or local funds charged to administrative costs pursuant to administrative costs pursuant to section 120(b)(1)(O) and section 130(b)(7), or (2) Federal funds available under section 136 (Grants to Assist in Overcoming Sex Bias). 115/

The same BOAE memorandum also establishes a general standard for when activities of the sex equity coordinator may be supported with Federal funds.

> With respect to the issue of whether activities undertaken by the full-time personnel may be supported with Federal funds, the governing principle is whether the proposed expenditure

---

114/ 34 C.F.R. §400.74(b).

115/ DHEW/OE Memorandum from Charles H. Buzzel, Acting Deputy Commissioner, BOAE, to State Directors of Vocational Education (March 29,1978). 34 C.F.R. §400.76 authorizes states to use funds available under section 130 (program improvement and supportive services) of the VEA "to support studies necessary to carry out the functions."

> directly supports the accomplishment of one or more of the ten functions. For example, the full-time personnel must "take action necessary to create awareness of programs and activities in vocational education designed to reduce sex bias and sex stereotyping in all vocational education programs." (104.75(a)). In order to satisfactorily perform this function, the full-time personnel are reimburseable from the $50,000 set aside. 116/

2. Findings, Conclusions, and Recommendations

We found significant variation in administrative arrangements made by states to perform the functions of the sex equity coordinator and in the degree of emphasis accorded to different functions in different states. All sex equity coordinators interviewed indicated that a major portion of their time was spent creating awareness of sex bias and sex stereotyping in vocational education programs through workshops, seminars, and the dissemination of information. We were also informed that considerable time was spent monitoring and reviewing programs, but it was unclear what effect this had.

Two major issues emerged from our review of state vocational education documents and our interviews with sex equity coordinators and state vocational education officials:

(a) the degree of overlap among the categories of activities in the ten functions; and

(b) the lack of clear standards concerning adequate performance of the functions.

116/ Id. The memorandum also provides guidance with respect to the use of the $50,000 for workshops and consultation.

a. The degree of overlap among the categories of activities in the ten functions--The regulations specify ten functions which must be performed by the sex equity coordinator. The categories of functions and the language used to describe them in the regulations are derived from the Act. All the sex equity coordinators interviewed indicated that there was some degree of overlap among the functions, although they disagreed on the extent to which they considered this to be troublesome. There was general agreement that if all the present activities could be reduced into fewer functions, it would be an improvement.

Our analysis of the current ten functions specified under 34 C.F.R. §400.75 indicates that these responsibilities could be reorganized and consolidated into five separate functions. The revised structure would be as follows:

- Monitoring Activities - The following activities will be monitored by sex equity personnel: (a) all vocational education programs (including work-study, cooperative vocational education, apprenticeship, and placement) within the state for sex bias (§400.75(e)); (b) all hiring, firing, and promotion procedures within the state relating to vocational education (§400.75(f)); and (c) the distribution of grants and contracts by the State Board (§400.75(d)).

- Reviewing Information and Data - The following information and data will be selected and reviewed by sex equity personnel: (a) data on the status of men and women students in vocational education programs of the state (§ 400.75(a)); (b) data on the status of men and women employees in vocational education programs of the state (§ 400.75(a)); (c) self-evaluations required by Title IX (§ 400.75(i))[This would be deleted if the review of Title IX self-evaluations is dropped from the regulations]; (d) the state's five-year and annual program plans and annual accountability reports will be reviewed by the sex equity coordinator and recommendations concerning overcoming sex bias with respect to such plans and reports will be made to state vocational officials prior to the submission of these plans and reports to the Secretary for approval (§400.75(j)); and (e) the distribution of grants and contracts by the State Board to assure that the interests and needs of women are addressed in all projects assisted under the VEA (§400.75(d)).

- Information Dissemination - Sex equity personnel shall disseminate data on the status of men and women students and employees in vocational education programs of the state and other information concerning sex bias in vocational education to the State Board, the State Advisory Council, the National Advisory Council on Vocational Education, the State Commission on the status of women, and shall make available to the general public, including individuals and organizations in the states concerned about sex bias in vocational education, the same data and information (§400.75(b) and (h)).

- Technical Assistance - Sex equity personnel shall assist local education agencies and other interested parties in the state in improving vocational education opportunities for women (§400.75(g)), with such assistance including actions necessary to create awareness of programs and activities in vocational education designed to reduce sex bias and sex stereotyping in all vocational education programs and assisting the State Board in publicizing the public hearings on the state plans (§400.75(a)).

- Remedial Action - Sex equity personnel shall develop and support actions to correct problems brought to their attention through the performance of the sex equity functions and through studies necessary to carry out the functions, including creating awareness of the Title IX complaint process (§400.75(c)).

b. The lack of clear standards concerning adequate performance of functions--There was little consensus among the sex equity coordinators interviewed about what constituted adequate performance for each of the functions. One sex equity coordinator discussed the MERC/Q process and indicated that although MERC personnel inquired about activity for each of the functions, there seemed to be a lack of clarity about what was considered adequate performance of a function.

We recommend that clear standards concerning adequate performance of each function be developed. This will help sex equity coordinators understand what is expected of them and will also assist monitors and evaluators in determining whether there has been adequate performance of each of the functions.

C. Policies for Eradicating Sex Bias (Including Incentives)

1. Description

Each state in its five-year plan must set forth policies and procedures which the state will follow to assure equal access to vocational education programs by both men and women, including:

(a) a detailed description of such policies and procedures, and

(b) Actions to be taken to overcome sex discrimination and sex stereotyping in all state and local vocational education programs. 117/

In addition, the plan must set forth incentives adopted by the state for eligible recipients to:

(a) encourage the enrollment of both women and men in non-traditional courses of study, and

(b) develop model programs to reduce sex bias and sex stereotyping in training for and placement in all occupations. 118/

The requirement that the state five-year plan must set forth policies and procedures that will include incentives to eligible recipients to reduce sex bias, as described above, has been the subject of a BOAE policy memorandum. This policy

---

117/ Section 107(b) of VEA (20 U.S.C. 2307(b)); 34 C.F.R. §400.187.

118/ 34 C.F.R. §400.187.

memorandum was issued to clarify the controversies sparked by use of "incentive" in the regulations in lieu of the plural "incentives" in the Act. The following is the complete text of the "discussion" section of the policy memorandum:

> The legislative history of Section 107(b)(4)(A)(iii) indicates that the Senate argued for ". . .incentives to be provided to local education agencies to develop model programs for the reduction of sex stereotyping in all occupations." (See Senate Committee on Labor and Public Welfare report number 94-882, 5/13/76, pages 74, 361.)
>
> However, the Senate receded to the House version of this section which was more expansive and identical to the wording now found in P.L. 94-482. Report number 94-1085 of the House Committee on Education and Labor (5/4/76) states on page 128 that the plan shall set forth ". . . incentives, to be provided to local educational agencies, so that such agencies will (I) encourage the enrollment of both women and men in non-traditional courses, and (II) develop model programs to reduce sex stereotyping in all occupations. . ."
>
> Regardless of the wording found in Regulation 104.787(a)(2), the legislative history of this section of P.L. 94-482 clearly indicates that the intent of Congress was to make provisions for a plurality of incentives to encourage as a minimum an incentive for each, both the enrollment of men and women in non-traditional course of study and the development of model programs to reduce stereotyping in all occupations.
>
> Moreover, while these incentives must be a part of the Five-Year Plan, any change in the incentive package must be made in the annual update of that Plan. Inherent in the Act is the notion that the incentives must be actively operating in an effective manner to stimulate change. Finally, the incentives should possess a measurable quality since the results of the incentive package must be reported in the Annual Plan as required by Section 108(b)(1)(C)(ii). Ideally, those incentives which are not producing the desired impact will be revamped or eliminated altogether and new incentives will emerge as part of the annual update.

> While the Act does not provide a description of suitable incentives, the Bureau of Occupational and Adult Education does recognize several types of incentives that appear to meet the intent of Congress. Acceptable incentives can take the form of fiscal inducements which make funds available to those local agencies which prepare innovative programs to deal with sex bias. There may also be nonfiscal inducements which encourage local agencies to undertake programs desired.[119]

Based on the above discussion, BOAE concluded that there must be at least one incentive for each of the purposes mandated: (a) model programs; and (b) the encouragement of male and female enrollment in non-traditional courses of study. BOAE also defined an incentive as an effectively operating stimulus or catalyst to reduce sex bias, stereotyping, and discrimination in the vocational education program.[120]

The Assistant Secretary for Vocational and Adult Education has taken the position that the Department of Education cannot require a particular incentive, however desirable it may be. In response to a formal complaint alleging, among other things, that a state's incentives consisted largely of plaques or publicity, the Assistant Secretary said:

---

[119] BOAE Policy Memorandum, BOAE/DSVPO FY 79-12 (July 23, 1979). A Notice of Proposed Rulemaking indicates that the term "incentive" in the regulation will be changed to "incentives" so that "the regulation will clearly reflect the statutory requirement that States offer more than one incentive to eliminate sex bias and sex stereotyping." 45 F.R. 28288 (April 28, 1980).

[120] Id.

> While the Department encourages the use of monetary incentives by the State to motivate change in enrollment patterns and the adoption of model programs, the law does not specify any particular incentives, but rather refers to incentives in general. Thus, the Department cannot require a particular kind of incentive however desirable it may be. We will continue to encourage the states to adopt the most effective incentives. We agree that incentives adopted by some states appear to provide greater inducements than others. We can only advocate, not require certain types.

BOAE has indicated in a Quality Review several possible incentives that it considers acceptable:

- Credit toward teaching certificate renewal for attendance in workshops which address the reduction of sex stereotyping;
- Special funding for model programs under Section 136 of the Act;
- Priority funding of local applications which address reduction of sex stereotyping; and
- publicity for the eligible recipient or teacher who makes an exemplary effort in this area.

2. Findings, Conclusions, and Recommendations

The requirement that five-year state plans include policies and procedures to assure equal access by both men and women, including actions to be taken and incentives, has been the subject of considerable misunderstanding. Early confusion was generated by the use of the term "incentive" in the regulations when the Act referred to "incentives." Further uncertainty was created about whether incentives had to be monetary.

was generated by the use of the term "incentive" in the regulations when the Act referred to "incentives". Further uncertainty was created about whether incentives had to be monetary.

Different states have interpreted the incentives provision differently. Examples from two states included in the study illustrate contrasting interpretations.

The first state received a Quality Review which stated that the incentives described in its five-year plan were "inadequate". BOAE wrote to the state director:

> The section on incentives in the five-year plan states that the state board will fund only programs or activities which are in compliance with the board's policy of sharing equal access and equal employment opportunities. [The state's] plan does not meet the intent of the regulation, which is to provide incentives that will motivate eligible recipients to provide additional services and activities.
>
> Action required:
>
> Revision to the plan supplying incentives which meet the requirements of the regulation.

Several months later BOAE wrote to the state director again to indicate that the state's proposed incentives were still not acceptable:

> Although the state board's policy of funding only those programs which reaffirm its position on discrimination is commendable, it does not meet the intent of the Act, regarding incentives. Incentives are required as a means of motivating eligible recipients "to encourage the enrollment of both men and women in non-traditional courses of study," and "to develop model programs to reduce sex bias and sex stereotyping in training for and placement in all occupations."

> Policy Memorandum No. 12 clarifies the issue in its statement that "inherent in the Act is the notion that incentives must be actively operating in an effective manner to stimulate change." Finally, the incentives should have measurable effects, since results of the attempts to reduce sex bias must be reported in the annual plan. . .
>
> Required action:
>
> Revise the five-year plan to include incentives which clearly motivate recipients to fulfill the intent of [the regulations and the Act].

The state director wrote back to BOAE and argued that the plan contained "numerous incentives".

> During FY 1980, all in-service programs and activities must include a component for the reduction of sex stereotyping and bias. Preference is given to all subpart 3 projects which are designed to reduce sex stereotyping and bias, and several model programs are currently operating. All curriculum activities must be sex fair in content and language and priority is given to activities which recruit students into nontraditional programs. We are in compliance with the regulation.

The next Quality Review directed the state's attention to the Policy Memorandum (FY 79-12) indicating that states had to have at least two incentives and that "incentives must be effective operating catalysts to reduce sex bias, stereotyping and discrimination in the vocational education program." The Quality Review suggested:

> The state should find money for its incentive programs. We feel that monetary incentives are more effective in motivating local agencies to both offer model programs and encourage nontraditional enrollments.

The state's 1980-81 annual plan states the following under the heading "Incentives":

> The state board will fund only programs or activities which are in compliance with the [state board's equal opportunity policy]. . . For additional incentives see personnel to reduce sex bias. . . in this annual program plan.

The state responded to the criticism about its incentives by including in the list of activities that the sex equity coordinator must carry out language that resembles the incentives requirement. Thus, one of the activities of the sex equity coordinator is:

> Determining those eligible recipients which have developed model programs to reduce sex stereotyping and bias and those eligible recipients which encourage the enrollment of men and women in nontraditional programs of vocational education for recognition and visibility at the annual vocational conference.

In contrast, another state provided cash incentives to several school districts and community college districts to reimburse them for the costs of travel, per diem and pay for substitute instructors to enroll administrators, counselors and regular instructors of vocational education in workshops on how to eliminate sex bias and sex stereotyping from vocational education programs and services.

As part of this model program incentive, the selected districts were expected to conduct the following activities:

> (1) review and analyze the enrollment of males and females in the selected program area.
>
> (2) review the literature on the problems, strategies and model programs related to the subject matter.

(3) develop criteria for a model program in the selected area, and appropriate measures of success.

(4) assure that the facilities, equipment and scheduling related to the program do not hamper equal access.

(5) assure that the attitude of instructors encourage non-traditional enrollments.

(6) assure that the curriculum materials, media, and displays contribute to the recruitment and retention of non-traditional students.

(7) promote the recruitment and retention of students in courses not traditional to their sex by using strategies reaching students, teachers, counselors, administrators, parents, and the community at large.

(8) encourage the placement of students in occupations not traditional to their sex by involving counselors, work experience coordinators, CETA prime sponsors, labor, business, and industry.

(9) develop a publication on the successful strategies for the model program and recruitment of students for dissemination to the field.

In our interviews with state vocational education officials, there was recognition that although plaques and publicity might be considered incentives, they might not be effective in meeting the intent of the Act that states give recipients incentives so that recipients will (1) encourage the enrollment of both men and women in nontraditional courses, and (2) develop model programs to reduce sex stereotyping. Respondents indicated that they generally understood the intent of the incentives provision, but that it was sufficiently unspecific to allow a wide range of "incentives".

There was no consensus among state vocational education officials about a single incentive that would be most effective in all situations. Options that would be considered effective were: (1) a set-aside of funds; (2) weighting review criteria for local applications so as to emphasize the priority on sex equity; and (3) waiver of particular requirements, e.g., the matching requirement.

Based on the above findings, we conclude that although the requirement that there be incentives is clear, the provision is inadequate because it fails: (1) to define acceptable incentives, and (2) to require that incentives be effective for the purposes for which they are intended. We recommend that Congress consider (1) a set-aside, and/or (2) weighted review criteria for recipient applications.

D. Descriptions of Uses in State Planning Documents

1. Description

Each state in its five-year state plan must set forth explicitly the uses which the state intends to make of funds available under VEA Section 120 (basic grant programs), Section 130 (program improvement and support services), Section 140 (special programs for the disadvantaged) and Section 150 (consumer and homemaking education), and the reasons for choosing such uses.[121]

---

[121] Section 107(b) of VEA (20 U.S.C. 2307(b)); 34 C.F.R. §400.186.

The VEA also requires that the annual program plan and accountability report contain provisions which update the five-year state plan to reflect later or more accurate employment data for a different level of funding than was anticipated.[122]

The planning provisions must also "set out explicitly" how the state during that fiscal year will do the following:

> (1) comply with the uses of federal, state and local funds proposed in its five year plan; including a description of these uses for state adminstration and in terms of the elements listed in Sec. 107(b)(2)(A) of the Act, also including a description of any changes in uses of funds from those proposed in the five year plan, giving reasons for such changes, and
>
> (2) will use funds available to it under the Act as set out in Sections 120, 130, 140 and 150 and describe how those uses may differ from the uses proposed in the five year plan; and
>
> (3) proposes to distribute funds among eligible recipients with an analysis of how such distribution complies with the assurances set out in the general application under Section 106(a)(5) of the Act.[123]

The planning provisions must also show the results of: (1) coordination of programs funded under the VEA and manpower training programs; (2) compliance of the state plan with Section 107(b)(4)(A) of the Act concerning providing equal access to programs by both men and women; and (3) participation of local advisory councils.[124]

---

[122] Section 108 of VEA (20 U.S.C. 2308(b)(1)).

[123] Id.

[124] Id.

2. Findings, Conclusions, and Recommendations

We found that state vocational education officials interviewed understood clearly that descriptions of uses of funds were required in state planning documents such as the five-year plan, and the annual program plan and accountability report. There was less clarity, however, about what it meant to set out such uses "explicitly". The best source of state interpretations of the term "explicitly" with respect to descriptions of fund uses is the state planning documents themselves. In many cases the state five-year plan merely parrots the language of the act or the regulations. Considerable study and analysis is necessary to get a picture of a state's intended use of funds from a planning document. Further analysis of annual accountability reports is necessary to determine if funds were expended for the purposes planned. The situation is even more complex because of the Tydings Amendment which permits unobligated funds to be carried over and spent during the succeeding fiscal year. Another source of difficulty in this area is the lack of a common format for state planning documents.

Descriptions of uses in state planning documents generally lack a key ingredient: a rationale for allocation decisions to particular program areas where the state has clear discretion to do so.

We conclude that different states are interpreting differently the requirement to set out "explicitly" descriptions of uses of funds in state planning documents. The term "explicitly" should be clarified by making it operational, i.e., define the type of information which must be included.

E. Results of Policies and Activities

1. Description

The VEA provides that a state must include in its annual program plan and accountability report, reporting provisions which:

> (a) show explicitly the extent to which the state has achieved the goals of its five year plan during the year preceeding the accountability report and the degree of compliance with the proposed uses of federal, state and local funds;
>
> (b) show explicitly how VEA funds have been used during the fiscal year, including a description of the uses of these funds for state administration and the uses set out in Section 120, 130, 140 and 150, and including a description of the distribution among eligible recipients except that, in accordance with a provision in the 1979 technical amendments, the commissioner may modify that requirement pursuant to regulations in order to avoid duplication of data collection occuring under Section 161 of the VEA or 437 of the General Education Provisions Act;[125] and
>
> (c) contain a summary of the evaluations performed pursuant to Section 112 of VEA and a description of how the state is using this information to improve its programs.[126]

The regulations interpret the reporting provisions of the VEA as forming the basis for the annual accountability report. The regulations provide that the accountability report shall:

---

[125] P.L. 96-45; see also Policy Memorandum BOAE/DSVPO FY 80-2.

[126] Section 108(b) of VEA (20 U.S.C. 2308).

(1) show the extent to which the state, during the fiscal year preceding the submission of the report, has achieved the goals of the five-year state plan, including a description in terms of the elements in Section 104.184;

(2) show the degree to which proposed uses of federal, state, and local funds in Section 104.222(b) have been complied with, including a description in terms of the elements in Section 104.185;

(3) show in detail how the funds used in Section 104.222(d) complied with the minimum percentage, matching and maintenance of effort requirements in Section 104.301;

(4) show in detail how the funds under the Act allocated for programs in Section 104.186 have been used during the fiscal year, including:
  (i) a description of uses of funds as set out in Section 104.222(c);
  (ii) a description of the distribution of funds available for these sections among local educational agencies and other eligible recipients in conformity with Section 104.222(e); and
  (iii) the results achieved by the uses of these funds. 127/

The accountability report shall also contain:

(1) a summary of the evaluation of programs conducted by the state in accordance with Section 104.402 and 104.404; and
(2) a description of how the evaluation information has been used to improve the state's programs of vocational education, including consideration given to each recommendation in the evaluation report of the state advisory council for vocational education. 128/

Further guidance has been provided concerning the statutory requirement in section 108(b)(1) of the VEA that the annual program plan show the results of compliance with the provisions of the five-year state plan concerning equal access by men and

---

127/ 34 C.F.R. §400.241.

128/ *Id.*

women.[129] These provisions require that the five-year state plan set forth:

> a detailed description of policies and procedures which the State will follow to assure equal access to vocational education programs by both women and men.
>
> This description shall include:
>
> (1) Actions to be taken to overcome sex discrimination and sex stereotyping in all State and local vocational education programs;
>
> (2) Incentives adopted by the State for eligible recipients to:
>
> (i) Encourage the enrollment of both women and men in nontraditional courses of study; and
>
> (ii) Develop model programs to reduce sex bias and sex stereotyping in training for and placement in all occupations. [130]

The Assistant Secretary for Vocational and Adult Education has written, in response to an administrative complaint, that the results of compliance with the equal access provisions must be expressed as specific indicators and not as a catalog of activities.

> [T]he requirements of section 108(b)(1) of the Amendments require specific indicators of progress in achieving sex equity, and not a catalog of activities. Progress is most effectively measured against specific baseline data . . .

The Assistant Secretary also indicated that the Department of Education requires "specific evidence of progress in achieving equity" when undertaking compliance reviews of annual program plans.

---

[129] Section 108(b)(1) of VEA (20 U.S.C. 2308(b)(1)).

[130] 34 C.F.R. §400.222(f).

2. Findings, Conclusions, and Recommendations

State interpretations of the requirement that the annual plan report the results of compliance with the equal access provisions in the five-year state plan vary. In general, we found that states have not described the results of progress toward measurable equity objectives, but have instead listed activities such as workshops, seminars, and dissemination of information.

Quality Reviews of annual plans from states included in the study have been critical of this. One 1980 Quality Review asked for results, not activities, and said, "[r]esults generally pertain to those beneficial or tangible effects the activities have on the teacher(s) or student(s)." A 1981 Quality Review concerning another state in the study said, "there is minimal discussion of actual results of equal access or sex stereotyping activities undertaken during FY 79 or FY 80" in the 1980-1982 annual plan.

In a third state included in the study, a 1979 Quality Review said the state should try to show "results in increased access for all persons" and asked:

> Are there enrollment changes resulting from the state's equal access policies and activities? If so, these should be reported as results of activities carried out in previous years.

Ironically, this state requires that recipients describe results in their application and defines "results", in application materials, as "the proposed results or end products (observable or measurable) [which] are identified and described in terms of impact."

We conclude that states are making little, if any, progress in reporting results of sex equity policies and activities in impact terms. To the extent that this flows from a lack of clarity in the legal framework, we recommend that the term "results" be defined in outcome or impact terms and that the state's obligations to report in the annual plan the results of compliance with the five-year plan's equal access provisions be clarified.

V. Local Policies

A. Introduction

This part discusses two of the most potentially significant local policies related to sex equity: (1) the requirements governing submission of the local funding application to the state; and (2) the requirements concerning local advisory councils for vocational education.

B. Description

1. Submission of Applications

An eligible recipient desiring to receive assistance under the VEA must submit an annual application to the state.[131] VEA funds will be distributed to eligible recipients "on the basis" of such applications.[132]

---

[131] Section 106(a)(4) of VEA (20 U.S.C. 2306(a)(4); 34 C.F.R. §400.141(f)).

The statute identifies six criteria which an annual application prepared by an eligible recipient must satisfy.[133] These criteria are described below.

First, all applications must have been developed in consultation with representatives of the educational and training resources (including prime sponsors) available in the area to be served by the applicant.

Second, the application must describe the vocational education needs of potential students in the area or community served by the applicant.

Third, the application must indicate how and to what extent the program proposed in the application will meet the need of the potential students.

Fourth, the application must describe how the findings of any evaluations of programs operated by the applicant have been used in the development of the program proposed in the application.

---

[132] Id. Legislative history identifies two major purposes of this requirement. First, the House explained that the requirement strengthens the ability of local agencies to focus their efforts on the greatest needs. H.R. Rep. No. 94-1085 at 34. The Senate explained that the requirement provides State Boards with the necessary information to make hard choices among competing applications for scarce resources. S. Rep. No. 94-882 at 70. Further, information submitted by eligible recipients will provide a substantial base for deciding whether to continue to fund existing programs or fund new and innovative programs. Id.

[133] Section C.F.R. 106(a)(4)(A)-(D) of VEA (20 U.S.C. 2306(a)(4)(A)-(D); 34 C.F.R. §400.141(f)(4)(A)-(D). Eligible LEAs must submit general assurances set out in Section 436(a) and (b) of GEPA, as amended in 1978. This new provision in GEPA does not relieve the state from collecting or the LEA from supplying additional or more specific information or assurances required under VEA. Further, the requirements of Section 436(a) and (b) of GEPA do not extend to other eligible recipients under VEA. See Policy Memorandum BOAE/DSVPO FY 79-15 at 3.

Fifth, the application must describe how the proposed activities relate to manpower programs conducted by prime sponsors under CETA.

Sixth, the application must describe the relationship between vocational education programs proposed to be conducted with VEA funds and other programs in the area which are supported by state and local funds.

The State Board, in its five-year state plan, must describe the information which it will require in the local applications in order to satisfy the six criteria.[134/] In addition to the six criteria described above, the VEA expressly requires that eligible recipients operating certain types of programs (*e.g.*, provision of stipends[135/] and placement services[136/]) include specified information in their applications. In addition, the State Board may require additional information it deems necessary.

2. Local Advisory Councils

The legal framework contains minimum standards regarding the establishment, composition, and responsibilities of local advisory councils. These requirements are described below.

[134/] Section 106(a)(4) of VEA (20 U.S.C. 2306(a)(4)); 34 C.F.R. §400.182(a).

[135/] 34 C.F.R. §400.573.

[136/] 34 C.F.R. §400.583.

a. Establishment--Each eligible recipient receiving VEA funds to operate vocational education programs must establish a local advisory council.[137] Such local advisory councils may be established for program areas, schools, communities, or regions, whichever the recipient determines best to meet its needs. In other words, the eligible recipient has the option to establish a local council which also serves another eligible recipient in the same geographical region of the state.[138] For example, an LEA and a community college in the same region may decide to establish one local council to advise both recipients.[139]

b. Composition--The VEA provides that the local advisory council must be composed of members of the general public, "especially" of representatives of business, industry, and labor.[140] The regulations interpret the word "especially" to require, at a minimum, a representative of each category.[141] The regulations include several permissible strategies for selecting the members of the local advisory council. An eligible recipient may form a council composed of representatives from several craft committees or representatives of several school councils having the requisite representatives from business,

---

137/ Section 105(g) of VEA (20 U.S.C. 2305(g); 34 C.F.R. §400.111-112.

138/ Comment, 42 F.R. 53870.

139/ Id.

140/ Section 105(g) of VEA (20 U.S.C. 2305(g)).

141/ 34 C.F.R. §400.111.

industry, and labor.[142] The regulations also state that the council must include "appropriate representation of both sexes" and of the racial and ethnic minorities found in the program areas, schools, community or region which the local advisory council serves.[143]

c. Functions performed by local advisory councils--The VEA and implementing regulations prescribe three functions to be performed by local advisory councils. First, local advisory councils must advise eligible recipients on current job needs.[144] Second, councils must advise eligible recipients on the relevance of programs (courses) being offered in meeting current job needs.[145] Third, the council must consult with the eligible recipient in developing its application to the State Board.[146]

d. Responsibilities of State Board and SACVE--Each State Board must notify eligible recipients in its state regarding their obligation to establish, select members, and permit the operation of local advisory councils in accordance with the

---

142/ 34 C.F.R. §400.111(e); See Comment, 42 F.R. 53870.

143/ 34 C.F.R. §400.111(d); See Comment, 42 F.R. 53870 which explains that the requirement concerning appropriate representation is consistent with one of the main purposes of the Act: to overcome sex discrimination and to furnish equal educational opportunity.

144/ Section 105(g) of VEA (20 U.S.C. 2305(g)); 34 C.F.R. §400.112.

145/ Id.

146/ Section 106(a)(4)(A) of VEA (20 U.S.C. 2306(a)(4)(A)); 34 C.F.R. §400.112.

requirements set out above.[147] SACVEs must make available to eligible recipients and local advisory councils such technical assistance as such recipients may request to establish and operate local councils.[148] The comments to the regulations state that it is inappropriate to add other responsibilities to the local advisory councils because the Act does not provide any funding for the local councils.[149]

C. Findings, Conclusions, and Recommendations

Sex discrimination, bias, and stereotyping in vocational education are most likely to be encountered at the local level where recipients administer vocational education programs. Consequently, it would be logical to assume that Congress, given its interest in sex equity and the declaration of purpose in the VEA, would have included in the Act specific provisions concerning local policies to overcome sex equity. This did not happen, however.

We found that the legal framework governing local policies to overcome sex inequity is inadequate to accomplish congressional intent. There is no requirement that an eligible recipient describe a sex equity action plan in the application.

---

[147] Section 105(g) of VEA (20 U.S.C. 2305(g)).

[148] Id.

[149] Comment, 42 F.R. 53870.

Further, none of the mandated functions of the local advisory councils concern overcoming sex inequity in local vocational education programs.

State policies governing recipient applications and local advisory councils generally reflect the inadequacies of the Federal legal framework, i.e., states in the study have generally not required: (1) that recipient applications provide information or plans about local action to overcome sex discrimination, bias, and stereotyping in vocational education; and (2) that local advisory councils play a role with respect to sex equity issues in local vocational education programs.

We recommend: (1) that the criteria for recipient applications be amended to require that local applications contain a sex equity action plan; and (2) that the functions of local advisory councils be expanded to include advising recipients about how to overcome problems of sex discrimination, bias, and stereotyping in local vocational education programs.

SUMMARY OF PART V

Part V

SUMMARY OF PART V

This part of the final report of the Legal Standards Project describes and analyzes the uses of incentives and sanctions in the VEA.

Chapter 10 describes and analyzes the primary incentives in the VEA.

Chapter 11 evaluates the system of oversight mechanisms and sanctions which are part of the current VEA legal framework.

CHAPTER 10

INCENTIVES

CHAPTER 10

INCENTIVES

Page

I. Introduction 1

II. The Meaning, Types, and Uses of Incentives 1

- A. Definition of the Term 1
- B. Types of Incentives 1
- C. Rationale for Using Incentives 3

III. Description and Analysis of VEA Applicable to States' Incentives 4

- A. Description of the Incentive 4
- B. Analysis of the Incentive 4

IV. Description and Analysis of the Incentives in the VEA Applicable to Local Recipients 8

- A. Description of the Incentives 8
- B. Analysis of the Incentives 10
  - 1. Relationship **Between** the Acceptance of VEA Funds and the Applicability of Specific Requirements 10
  - 2. Alternatives to the Existing Incentives 14

CHAPTER 10
INCENTIVES

I. Introduction

This chapter describes and analyzes the uses of incentives to induce states and other eligible recipients to adopt desired behaviors under the VEA. The first section defines the term "incentive" for purposes of the paper, describes the various types of incentives, and describes the various uses of incentives. The second section describes and analyzes the incentives in the VEA applicable to states. The final section describes and analyzes the incentives in the VEA applicable to local recipients.

II. The Meaning, Types, and Uses of Incentives

A. Definition of the Term

In the legislative context, an "incentive" is something of value offered by a grantor to an eligible recipient in exchange for an agreement to adopt desired behaviors specified in a law and the implementing regulations.

Implicit in the definition of an incentive is the concept of freedom of choice, i.e., states, LEAs and other eligible recipients are not compelled to adopt the desired behaviors specified in the law and regulations -- the decision is voluntary in nature. It is only if a state, LEA, or other eligible recipient accepts something of value from the grantor that it must also agree to adopt the specified behaviors.

B. Types of Incentives

There are two general types of incentives -- fiscal incentives and nonfiscal incentives. One type of fiscal incentive is the award of funds by the grantor to a grantee, contingent on the grantee's entering into an agreement which specifies that it will carry out certain desired behaviors or outcomes specified in the law. An example of this type of fiscal incentive is the availability of appropriations under the VEA. Each state, in accordance with a Federal formula, is "entitled" to a predetermined amount of funds. States may choose to apply for these funds. In its application and plans, a state generally agrees to adopt the desired behaviors specified in the law. The grantor's obligation is to: (1) ensure that the applications and plans submitted by the state contain a description of how it plans to adopt all the desired behaviors; (2) oversee implementation of the agreement; and (3) use sanctions, if necessary, for breach of the promise.

A second type of fiscal incentive is the promise of funds contingent on the demonstration that the desired outcomes specified in the legislation have been accomplished. For example, Congress could amend the VEA to provide that a state will be reimbursed x dollars for every student in a vocational education program who completes the program or who leaves before completing the program, finds employment in occupations related to their training and is considered by an employer to be well-trained and prepared for employment. Under this type of fiscal incentive where the grantee receives reimbursement only if it can demonstrate that it has accomplished the desired outcomes, the grantor must carefully scrutinize the grantee's alleged accomplishments before it will reimburse the grantee. The holding back of the reward until demonstration of success is used in lieu of sanctions.

In addition to fiscal incentives, there are also nonfiscal incentives. The most frequently used nonfiscal incentive is the waiver of certain prescribed behaviors where the grantee can demonstrate that it is already manifesting the desired behavior. For example, under Part B of the Education of the Handicapped Act, as amended by P.L. 94-142, the Secretary may waive the nonsupplanting provision [1/] where a state can demonstrate that all handicapped children in the state have available to them a free appropriate public education (the desired behavior specified in Part B of EHA).

C. Rationale for Using Incentives

There are two basic reasons for using incentives. First, the entity offering the incentive has identified a set of minimum desired behaviors or outcomes which it wants every recipient of the inducement to adopt. By offering the incentive, it expects every recipient will adopt the minimally prescribed behaviors. An example of this type of incentive is the appropriation of funds under the VEA. The desired behaviors which all states that accept VEA funds must adopt are set out in the legislation.

The second reason for using an incentive is to induce a recipient (which has agreed to adopt the minimally acceptable desired behaviors) to exceed the minimum.

[1/] 34 C.F.R. §300.589.

III. Description and Analysis of VEA Applicable to States' Incentives

A. Description of the Incentive

Under Part A of the VEA, the primary incentive operating at the state level is the appropriation of funds by Congress. Every state that accepts assistance under Part A of the VEA agrees to adopt all of the desired behaviors specified in the law and implementing regulations.

B. Analysis of the Incentive

The purpose of the incentive in the VEA operating at the state level is to induce states to agree to adopt the desired behaviors prescribed in the legislation by offering them Federal assistance. This incentive has been effective, *i.e.*, it has induced all states to agree to adopt the desired behaviors prescribed in the legislation. Given the budget crises currently facing many states, it is likely that *all* states will continue to accept VEA assistance.

The question remains whether other types of incentives should be added to the VEA that would apply at the state level. Set out below are incentives which Congress should consider during its reauthorization deliberations.

The first incentive which Congress should consider concerns the set-aside for handicapped students. Under current law, every state that accepts VEA assistance must set-aside 10 percent of its appropriation under subpart 2 (basic grant) and subpart 3 (program improvement and supportive services) for handicapped students. Several states contend that they should be free to use these set-aside funds for other purposes if they can demonstrate that they are already manifesting the desired behavior (i.e., they are providing a free appropriate public education to all secondary students who are handicapped and an equal opportunity to all postsecondary students who are handicapped) with other Federal dollars (e.g., funds under P.L. 94-142) as well as state and local funds for special education.

As described above, Part B of EHA, as amended by P.L. 94-142 exempts, in part, states from the supplanting provisions if they can demonstrate by clear and convincing evidence that the state has made available a free appropriate public education to all handicapped students.

Congress should consider using the incentive presently set out in Part B of EHA as the basis for considering the inclusion of an incentive in the VEA that would permit a state to use set-aside funds for other purposes when it can demonstrate that it is already meeting the needs of all handicapped students in vocational education from other sources.

In assessing the viability of this option, Congress should weigh the following factors.

(1) Has the waiver set out in Part B of EHA proven to be realistic (has any one applied) and workable (was the Secretary able to come up with standards for determining whether the threshold standard had been met)? [2]

---

[2] To date, only the state of Massachusetts has applied for and received a partial waiver from the 94-142 supplanting provision. The Education Department's letter granting the waiver indicates that even in a state like Massachusetts (which has manifested **exemplary commitment to meeting the needs of handicapped** students) still is not appropriately serving all children in all communities. (Correspondence from Edwin W. Martin to Gregory Anrig (July 24, 1978)).

(2) Since Part B of EHA only applies to elementary and secondary programs, what standards can be used to determine whether all postsecondary vocational students who are handicapped have been provided equal and effective opportunity?

(3) Is it possible to develop an objective proxy for full compliance, *e.g.*, a ratio of state dollars to Federal dollars used to meet the needs of handicapped students in lieu of the more subjective determinations required under P.L. 94-142?

(4) Should handicapped persons or their representatives be provided notice and an opportunity to challenge a state's assertions?

The VEA does not include incentives which induce states to exceed the minimum desired behaviors. A Federal statute which includes this type of incentive is Title I of ESEA. Title I provides Federal assistance to school districts to meet the special needs of educationally deprived children residing in low-income areas (compensatory education). The Title I legislation also includes a special incentive grant which encourages states to adopt their own state compensatory programs. The inducement offered by the Federal government is *additional* Title I dollars to match the additional dollars appropriated by the state for compensatory education. To date, Congress has not appropriated any funds to implement this special incentive grant program.

We conclude that such an incentive is unnecessary under the VEA. States currently overmatch the Federal vocational education dollars at a rate of roughly 10 to 1, and therefore need no incentive to spend more money. Unless the Federal VEA framework sought to create an incentive applicable only to those states *below* the national matching ratio, the incentive would operate to favor wealthy, high expenditure states. Such would contradict the overall VEA objective of targeting *more* Federal dollars to fiscally needy areas.

We do not recommend that Congress adopt a fiscal incentive that makes the promise of Federal funds contingent on the demonstration that it has performed at a predetermined level. First, given the cash flow problems facing many states, the use of a reimbursement method of payment instead of advance payment will discourage, not encourage, the most needy states from applying for VEA funds. Second, it would be difficult, if not impossible, to devise suitable outcome measures of performance, short of simply using the present behaviors prescribed in the current legislation as proxies. The example set out earlier in this chapter (see page 2) where states would be reimbursed based on the success of the LEAs and other eligible recipients in finding employment for students in the vocational education program should not be adopted.

Furthermore, we do not recommend that Congress adopt a scheme which simply sets out ultimate outcomes rather than prescribing certain desired behaviors and provides advance funding which must be paid back to the Federal government if a state fails to accomplish the prescribed outcomes. There are two major reasons why such an alternative scheme should be rejected. First, once the Federal government has paid out funds to a state it would be politically untenable to require a total repayment of those funds from those recipients who failed to meet the desired level of performance. A sliding scale approach under which a state would have to repay a certain amount (rather than the entire appropriation) would also prove untenable if the amount a recipient had to repay was truly related to the degree to which it failed to perform at the agreed upon level.

Second, it would be difficult, if not impossible, to establish outcome standards under vocational education for measuring success given the diversity of programs funded, the level of Federal funding provided, and the forces beyond the control of vocational education institutions which effect the outcomes.

IV. Description and Analysis of the Incentives in the VEA Applicable to Local Recipients

A. Description of the Incentives

The VEA includes several incentives which induce LEAs and other eligible recipients to adopt desired behaviors specified in the VEA. The primary incentive is fiscal in nature, *i.e.*, the availability of funds under subpart 2 (basic grant), subpart 3 (program improvement and supportive services), subpart 4 (programs for the disadvantaged), subpart 5 (consumer and homemaking), and special set-aside programs under subparts 2 and 3 for disadvantaged and handicapped students.

As an additional inducement for eligible recipients to apply for certain purposes, the VEA: (1) was amended in 1979 to authorize the Secretary to reduce the state matching requirements for states and school districts with low fiscal ability; (2) continues the subpart 4 provision which authorizes 100% Federal funding for special programs for the disadvantaged; and (3) allows 100% Federal funding under subpart 5 (consumer and homemaking) for economically depressed areas.

The VEA also requires that states adopt incentives to encourage eligible recipients to enroll both women and men in nontraditional courses of study and develop model programs to reduce sex bias and sex stereotyping in training for and placement in all occupations. These incentives must be meaningful and effective. Policy guidance provided by the Federal government explains that:

> Section 107(b)(4)(A)(iii) directs that incentives will be provided to eligible recipients to (1) encourage the enrollment of both women and men in nontraditional courses of study, and (2) develop model programs to reduce sex stereotyping in all occupations. While the Department encourages the use of monetary incentives by the State to motivate change in enrollment patterns and the adoption of model programs, the law does not specify any particular incentive, but rather refers to incentives in general. Thus, the Department can not require require a particular kind of incentive however desirable it may be. We will continue to encourage the States to adopt the most effective incentives. We agree that incentives adopted by some States appear to provide greater inducements than others. We can only advocate, not require certain types.3/

Examples of fiscal incentives include establishing separate "funding pools" to satisfy the mandates or providing priority to LEAs and other eligible recipients that include appropriate programs in their applications for funds under Part A of the VEA.

In addition to the broad "set-asides" explicitly established by the VEA, several states have adopted funding pools. For example, some states have met their obligation to develop "incentives" regarding sex equity by establishing "funding pools" for programs to reduce sex bias and sex stereotyping and encourage

---

3/ Correspondence from Daniel B. Taylor to Ginny Looney (September 4, 1980).

recipients to enroll both men and women in nontraditional courses; other states have adopted separate "funding pools" for "new" programs; still others have limited the use of VEA funds to some but not all of the authorized uses set out in subpart 2. **These matters are discussed in greater detail in Chapter 4.**

B. Analysis of the Incentives

There are five major policy issues concerning incentives applicable to local recipients. The first concerns the relationship between the acceptance of VEA funds and the applicability of specific requirements. The second concerns the use of alternative incentives. The third concerns the disincentives (i.e., priorities within priorities) included in the provisions concerning work-study, cooperative vocational education, and consumer and homemaking education. The fourth concerns the adequacy of the waiver provisions affecting the set-asides. The final concerns the adequacy of the sex equity incentive requirement.

Policy issues one and two are analyzed below. Issue three is discussed in chapter 2. Issue four is discussed in chapter 5. Issue five is discussed in chapter 6.

1. Relationship Between the Acceptance of VEA Funds and the Applicability of Specific Requirements

As explained supra, LEAs and other eligible recipients are not required to apply for assistance under the VEA. Furthermore, an LEA can choose, from among various authorized uses, which funds it wants to receive. The acceptance of funds is the quid pro quo for adopting certain desired behaviors prescribed in the legislation and implementing regulations. The question is which desired behaviors should an LEA or other eligible recipient be required to adopt when it accepts funds under specific authorizations.

As explained above, when a state accepts funds under the VEA, it agrees to spend a proportion for prescribed purposes, e.g., 20 percent of subpart 2 and 3 funds for disadvantaged students. Should an LEA which accepts any VEA funds be required to spend 20 percent of its grant for the disadvantaged? Under the existing VEA, an LEA which does not apply for funds under the set-aside for the disadvantaged is not required to spend any VEA funds for the disadvantaged. This policy is consistent with the general policy of the VEA which permits LEAs and other eligible recipients to select from among authorized uses which funds it wants. Congress sould consider whether it wants to retain this policy or require that local recipients, like state recipients, must set-aside a specified percentage of a grant for national priority programs.

A related question is whether an LEA which accepts VEA funds for one authorized use under subpart 2, e.g., industrial arts, should be required to operate all of the other components of its vocational education programs in conformity with the provisions in subpart 2 of Part A of the law and implementing regulations. In other words, if an LEA applies for $10,000 from VEA to improve the industrial arts component of its vocational education program, should it operate all its other components which are paid for totally out of state and local funds in compliance with the VEA requirements for operating such programs?

§300.301(c) of the regulations, as amended on April 3, 1980 states that: [4]

> State and local funds that are applied to the maintenance of effort requirements of the Act are subject to the conditions and requirements of the Act, regulations, five-year state plan, and annual program plan.

In accordance with this regulation, the Federal government has explained that if a state funds a cooperative vocational education component of its overall vocational education program with only state monies the cooperative vocational education program must meet all of the requirements for operating cooperative vocational programs under the VEA if the state and local funds used for such programs do not exceed the maintenance of effort requirement. If the state and local funds exceed the maintenance of effort requirement and the use of these funds was not reported under the five-year state plan, then the cooperative program need not satisfy the VEA requirements. [5]

In short, a recipient that accepts any VEA funds under subpart 2, must operate all of the components of its vocational education program in accordance with the VEA requirements to the extent that the state and local funds are included for purposes of calculating maintenance of effort.

---

[4] This regulation interprets Section 111(a) of the VEA.

[5] The situation where state and local funds are not included in computing maintenance of effort is the rare exception; the general rule is that all state and local funds are included.

The appropriateness of this OVAE policy should be carefully scrutinized by Congress during its reauthorization deliberations. The House Report accompanying the 1976 Amendments can be construed as suggesting an alternative interpretation.

> The Committee seeks to achieve greater accountability while simplifying the administration of the program. Accordingly, it is proposed that all of the present categorical programs be consolidated into a block grant to the states.... This means that each state can decide how much it wishes to spend on each of these programs, including the option of deciding not to spend anything at all on any one of them. 6/

Some state directors argue that this statement means that if states can choose from among authorized uses, it follows that LEAs and other eligible recipients may also choose to apply for funds for one component of their program and therefore they need only satisfy the rules in the VEA governing the structure of the components of their program for which they seek assistance.

We recommend that Congress clarify this issue. Congress could require that the recipient of VEA funds by a recipient for any particular component of its vocational education program under subpart 2 triggers a requirement that all components be structured in accordance with the VEA rules. A second alternative would be that only those components of its overall vocational education program receiving assistance must be structured in accordance with the VEA and other components need not be set out in its state plan. A third alternative would be that only those components of its overall vocational education program receiving assistance must be structured in accordance with the VEA but all components of the

---

6/ H.R. Rep. No. 94-1085 at 43.

vocational education program must be described in the state plan to ensure maximum coordination.

2. Alternatives to the Existing Incentives

For the reasons set out supra., we do not recommend that the VEA be revised to include incentives that make the award of VEA funds contingent on the demonstration that a certain level of performance has been attained (reimbursement approach). Also for the reasons set out supra., we do not recommend that Congress adopt a model that makes the retention of VEA funds contingent on the demonstration that the recipient has attained a prescribed level of performance.

CHAPTER 11

OVERSIGHT MECHANISMS AND SANCTIONS

CHAPTER 11

OVERSIGHT MECHANISMS AND SANCTIONS

Page

I. Introduction 1
  A. Purpose and Organization of Chapter 1
  B. Overview of the Major Findings, Conclusions, and Recommendations 4
    1. Introduction 4
    2. Enforcement Scheme Governing the Relationship Between ED and the States 5
    3. The Enforcement Scheme Governing the Relationship Between States and Local Recipients 7
II. Provisions in the VEA Designed to Ensure that the Federal Government Carries Out Its Responsibilities 7
  A. Introduction 7
  B. National Advisory Council on Vocational Education (NACVE) 8
  C. Review of State Submissions By Other Agencies Within The Department of Education 8
  D. Minimum Staff Assignments 9
  E. Reports to Congress 11
  F. Analysis of the Requirements 11
III. Description and Analysis of the Mechanisms in VEA and GEPA Used to Oversee the Appropriate Use of VEA Funds by States 13
  A. Introduction 13
  B. Reviewing and Preparing Written Analysis of State Plans and Reports 14
    1. Description of the Legal Framework 14
    2. Analysis of the Legal Framework 19
  C. Conducting On-Site Reviews 22
    1. Description of the Legal Framework 22
  D. Analysis of the Legal Framework 23
  E. Conducting Fiscal Audits 24
    1. Description of the Legal Framework 24
    2. Analysis of the Legal Framework 24
  F. Reviewing State Board Rejections of Agency and Council Recommendations 24

Page

1. Description of the Legal Framework 24
2. Analysis of the Legal Framework 28

G. State Advisory Councils on Vocational Education 29

IV. Description and Analysis of the Sanctions Used by ED to Secure Compliance 30

A. Introduction 30

B. Withholding Approval of the State Plans and Reports . 30

1. Description of the Legal Framework 30
2. Analysis of the Legal Framework 31

C. Withholding and Suspending Payments 31

1. Description of the Legal Framework 31
2. Analysis of the Legal Framework 33

D. Recoupment of Misspent Funds 36

1. Description of the Legal Framework 36

E. Cease and Desist Orders 37

F. Payback Provision 37

V. Description and Analysis of Oversight Mechanisms in VEA and GEPA Used to Ensure Compliance by LEAs and Other Eligible Recipients 38

A. Introduction 38

B. Review of Applications 39

1. Description of the Legal Framework 39
2. Analysis of the Legal Framework 41

C. State Evaluations 42

1. General Evaluations by the State Board 42
2. Special Data for Completers and Leavers 43
3. OVAE Policy 45
   (a) Program 45
   (b) Sampling 46
   (c) Five-Year Evaluation Cycle 47
   (d) Aggregate of Evaluation Results 48

D. Monitoring 48

1. Description of the Legal Framework 48
2. Analysis of the Legal Framework 48

Page

E. Auditing 49
  1. Description of the Legal Framework 49
  2. Analysis 49
F. Complaint Resolution 49
  1. Description of the Legal Framework 49
  2. Analysis of the Legal Framework 50

VI. Sanctions Which States May Use To Secure Compliance 51
  A. Introduction 51
  B. Description of Sanctions 51
  C. Analysis of Sanctions 52

CHAPTER 11

OVERSIGHT MECHANISMS AND SANCTIONS

I. Introduction

A. Purpose and Organization of Chapter

The previous chapter described and analyzed the use of incentives under the VEA to induce states and local recipients to adopt certain desired behaviors. The chapter explained that the primary incentive in the existing VEA is the appropriation of funds. This incentive is an inducement for state and local recipients to agree to comply with the VEA requirements (*i.e.*, adopt the desired behaviors) prescribed in the law and implementing regulations in exchange for a prescribed amount of funds.

In order to ensure that the state and local recipients understand the nature of their commitments and are accountable for acting in accordance with these commitments, the VEA and the General Education Provisions Act (GEPA) (and Edgar)[1] contain oversight mechanisms and sanctions.

The purpose of this chapter is to describe and analyze the adequacy of the oversight mechanisms and sanctions that are used to ensure that ED, states, and local recipients act in accordance with their respective commitments.

In April of 1979, NIE published a book entitled, *The Planning Papers for the Vocational Education Study* (Publication No. 1). The paper written by Dr. Michael W. Kirst concerns the issue of compliance and enforcement.[2]

---

[1] The General Education Provisions Act, Sec. 400(a) of Title IV of P.L. 90-247 (as amended) (20 U.S.C. 1221) and its implementing regulations, Edgar, are included in this description of the legal standards. These provisions are applicable to the VEA, as to other education programs administered by heads of education agencies.

[2] "Research Issues for Vocational Education: Compliance and Enforcement of Federal Laws", 51-70.

The thesis of Dr. Kirst's paper is that the VEA, as amended in 1976, lacks the incentives and sanctions to bring about compliance with Federal intent within the next few years. There is some hope for a long-run (10-year) compliance. Furthermore, Dr. Kirst contends that it is unlikely that Federal influence will ever be sufficient to reorient vocational education substantially without drastic changes in the existing Federal-state-local delivery network.[3]

Dr. Kirst summarizes his perceptions of the vocational education system as follows:

> In sum, vocational education is a state program which receives federal assistance. Vocational educators at all levels operate with a high degree of autonomy from the rest of their respective education agencies. They are frequently not just organizationally, but also physically, separated from the rest of the SEA by location in a separate building. Strong professional norms of vocational educators dictate that external (federal or state) regulation should not supersede peer regulation or personal autonomy in the function of the professional. Evaluations of the lack of impact of the 1963 and 1968 federal vocational acts demonstrate that members of the same vocational professional group and "function set" should not be expected to police or reorient each other. Vocational educators at all levels display remarkably similar educational background, work experience, and patterns of socialization, i.e., a high professional-function set congruence in Cresswell's terms. Like-minded administrators at the federal and state levels are responsible for establishing program guidelines, checking to see that proposals meet those guidelines, monitoring programs, and evaluating

---

[3] Id. at 51.

> their effectiveness. There has been minimal independent auditing activity for example by HEW or GAO, compared to ESEA Title I. Management and performance information is so limited that administrative oversight and policy planning are severely curtailed.[4]

Dr. Kirst, reflecting on these factors, suggests that the VEA "will be absorbed (in large part) into standard procedures for operating and funding. The Act is swimming upstream against an extremely powerful current of vocational professionalism and norms."

Dr. Kirst concludes by suggesting several strategies for securing compliance, including what he calls "Top-Down Compliance." The major point of his discussion focuses on the experience of implementing Title I of ESEA. In the early days of Title I noncompliance and ineffective programs were the norm. Today, the norm is compliance and effective programs. Dr. Kirst asks:

> If it can happen in Title I why not vocational education. Which compliance strategies and tactics worked in Title I. Can they be transferred or adopted to vocational education? These are the essential questions in NIE's mandate to examine "how to achieve compliance with and enforcement" of vocational education 1976 provisions.[5]

Although there are several significant differences between Title I of ESEA and the VEA (e.g., the size of the programs and the orientation of the persons responsible for administering the laws), Dr. Kirst's advice was given due consideration in writing this chapter.

---

[4] Id. at 56.

[5] Id. at 59.

The chapter is organized into six sections. The first section contains the major findings, conclusions, and recommendations regarding the adequacy of the sanctions. It should be noted that this chapter does not focus on the capacity or commitment of OVAE or the states to administer the VEA; rather the focus is on the adequacy of the mechanisms in the VEA and GEPA which the oversight agencies may use to ensure compliance.

The second section describes and analyzes the provisions in the VEA designed to ensure that the Federal government carries out its responsibilities. The third section describes and analyzes the oversight mechanisms used by ED to ensure that states use VEA funds for authorized purposes. The fourth section describes and analyzes the sanctions available to ED to secure compliance by states. The fifth section describes and analyzes the oversight mechanisms used by states to ensure compliance by local recipients. The final section describes and analyzes the sanctions which states may use against non-compliant local recipients.

B. Overview of the Major Findings, Conclusions, and Recommendations

1. Introduction

The VEA and GEPA (and Edgar) establish a system for ensuring that VEA funds are used by state and local recipients in accordance with the rules set out in the legislation implementing regulations. The enforcement system operates at the three stages in the life of a grant: (1) pre-grant period;

(2) implementation period; and (3) post-grant period. Set out below are our major findings, conclusions, and recommendations regarding the adequacy of the enforcement system governing the relationships between ED and the states, and the state and the local recipients.

2. Enforcement Scheme Governing the Relationship Between ED and the States

In general, the structure of the basic enforcement system governing the relationship between ED and the states is sound. At the pre-grant stage, ED reviews state plans and disapproves those plans which fail to satisfy the requirements in the law and regulations. This process theoretically creates an understanding of mutual expectations between the parties prior to the point at which funds are obligated. At the implementation state, ED provides technical assistance and monitors the actual implementation of the plans and takes enforcement actions only against those states which fail to live-up to the commitments set out in their state plans. At the post-grant period, ED conducts audits and recoups misspent funds.

Notwithstanding our finding that the basic structure is sound, we have identified several significant problems with the actual language of certain sections and with OVAE's commitment and capacity to carry out its responsibilities. One, although states are required to submit an excessive amount of data in state plans and accountability reports, OVAE does not require that states submit appropriate data in state plans and accountability reports regarding key requirements such as funds distribution. For example, state plans and reports are often deficient in fully describing the manner in which factors are defined, calculated and used in the state's VEA funds distribution formula, and how these factors apply to specific eligible recipients. In some cases it took extraordinary effort, including interviews, to piece together the elements of state formulae.

Two, OVAE frequently fails to enunciate clear policies in areas requiring clarification or reverses its policy in mid-year, thereby placing a severe strain on the Federal/state relationship. Where OVAE reverses a clearly articulated and universally applied policy in mid-year, the new policy should not go into effect until the beginning of the next school year. Our proposal to postpone the effective date of the new policy should not be construed as excusing states which relied on oral statements or actions by Federal officials (e.g., plan approval) that are contrary to clearly articulated pre-existing Federal policies since waivers of statutory and regulatory provisions are prohibited as being contrary to public policy.

Three, the VEA and GEPA do not always clearly articulate the relationship among oversight mechanisms. For example, the legal framework does not (but should) provide that state plans may not be approved until problems identified in previous monitoring and aduting reports have been rectified. Instead, problems identified in a report are perpetuated into the next year.

Four, the withholding sanction -- although rarely (if ever) used -- is an effective deterrent but should be supplemented by other sanctions which operate at the program implementation stage. Congress should consider authorizing ED to enter into compliance agreements in lieu of withholding. Under a compliance agreement, a state admits that it is in violation and agrees, in writing, to take specific steps to come into full compliance within a predetermined period.

Five, the scope of audits (fiscal and/or compliance) should be clearly delineated as should the process for recouping misspent funds.

3. The Enforcement Scheme Governing the Relationship Between States and Local Recipients

The enforcement scheme governing the relationship between states and local recipients is not as fully developed as the Federal/state scheme. The major oversight responsibility and sanction set out in the VEA is application review and approval/disapproval. Other functions, such as monitoring and auditing are set out in GEPA and EDGAR. However, what constitutes satisfaction of the mandate to monitor is unclear and OVAE has not assumed a leadership function in clarifying provisions in GEPA and EDGAR. With respect to auditing, it is unclear whether any auditing of local recipients is in fact required. The withholding sanction should be supplemented by authority for states to enter into compliance agreements with local recipients. To the extent auditing is required, the procedure for resolving audit exceptions and recouping misspent funds must be specified.

II. Provisions in the VEA Designed to Ensure that the Federal Government Carries Out Its Responsibilities

A. Description of the Legal Framework

1. Overview

The legislative history accompanying the 1976 amendments to the VEA identifies several major problems regarding the manner in which the Federal government was administering the VEA. The VEA as amended now includes four mechansisms designed to ensure that the Federal government carries out its responsibilities in an effective and efficient fashion:

- existence of the National Advisory Council on Vocational Education (NACVE);
- review by offices other than BOAE of of state plans;
- minimum staff assignments; and
- reports to Congress.

This subsection of the chapter describes and analyzes these provisions.

2. National Advisory Council on Vocational Education (NACVE)

Section 162 of the VEA[6] provides that, the NACVE, which was created by 1963 VEA amendments, shall continue to exist during the period for which appropriations are authorized under the VEA. The NACVE is charged with performing several functions including, among other things, reviewing the administration and operation of vocational education programs under the VEA, making recommendations with respect to such administration, and issuing annual reports of its findings and recommendations.

3. Review of State Submissions By Other Agencies Within The Department of Education

In 1976, Congress was concerned that OVAE was not making sufficient use of available expertise within the Department. Section 109(A)[7] provides that the Commissioner (now the Secretary) must provide for appropriate review of each state's five-year plan, annual program plan.

---

[6] 20 U.S.C. §2392.

[7] 20 U.S.C. 2309(a)(3)(A).

and accountability report by the various agencies within the Department administering programs related to the vocational education programs being proposed under the state plans and reports.

4. Minimum Staff Assignments

Prior to enactment of the Education Amendments of 1976, the House Committee on Education and Labor expressed serious reservations about the inadequate number of persons assigned to administer vocational education at the Federal level.

> The Committee cannot understand why [OE] has cutback so drastically on the persons assigned to administer the [VEA] within the last 10 years. . . . It seems totally irresponsible to decrease by one-third the number of people who are to oversee the proper administration of a program in which the Federal funds have more than doubled. [8]

In response to these concerns, Congress wrote into the VEA certain requirements governing positions and staffing levels in BOAE. Congress required that a Deputy Commissioner head BOAE and that the following positions be assigned to it:

- Three GS-17 positions, one of which must be filled by a person with "broad experience in the field of junior and community college education."
- Seven GS-16 positions, at least two of which must be filled by persons with "broad experience in the field of post-secondary -- occupational education in community and junior colleges," at least one of which must be filled by a person "with broad experience in

---

[8] H.R. Rep. No. 94-1085 at 28.

education in private proprietary institutions," and at least one of which must be filled by a person "with professional experience in occupational guidance and counseling," and

- a position filled by "a skilled worker in a recognized occupation," and
- a position filled by "a subprofessional technician in one of the branches of engineering," and
- a position filled by "a subprofessional worker in the branches of social or medical services." [9]

The persons who fill these last three positions must serve as "senior advisors in the administration of the programs" in BOAE.[10]

In addition to the above positions, Congress required that the Commissioner assign the BOAE, by the end of FY 1978, at least fifty percent more persons "to directly administer the programs authorized" under the VEA than were assigned to directly administer the VEA during FY 1976.[11]

USOE and BOAE terminated on the effective date of the Department of Education Organization Act (Pub.L. 96-88). [12] Responsibilities for vocational education in the Department of

---

[9] Sec. 160(b)(1) and (2) of the VEA; 20 U.S.C. 2390 (b)(1) and (2).

[10] Sec. 160(b)(2) of the VEA; 20 U.S.C. 2390(b)(2).

[11] Sec. 160(b)(3) of the VEA; 20 U.S.C. 2390(b)(3).

[12] Sec. 503(a)(1)(C) and (b) of the DEOA: 20 U.S.C. 3503(a)(1)(C) and (b).

Education are now assigned to the Office of Vocational and Adult Education (OVAE) which is headed by an Assistant Secretary for Vocational and Adult Education.[13]

The Department of Education Organization Act does not, except for the position of Assistant Secretary for Vocational and Adult Education, specify either the type or number of positions for the Office of Adult and Vocational Education.

5. Reports to Congress

Section 112(c) of the VEA provides that the Secretary must prepare and submit annually to the Congress a report on the status of vocational education in the country during that fiscal year. The report must include, among other things, an analysis of data on the information developed in VEDS and a summary of the findings of the reviews and audits conducted by the Federal government and the evaluations performed by the states.

B. Analysis of the Requirements

With one exception, the system established by the VEA is adequate to accomplish the objective of overseeing its administration by the Federal government. The one structural problem is the absence of a procedure for handling complaints by beneficiaries of the assistance and their representatives. In response to a complaint filed by the Georgia ACLU recommending disapproval of Georgia's state plan, the Assistant Secretary for Vocational and Adult Education explained:

---

[13] Sec. 206 and 202(b)(1)(C) of the DEOA; 20 U.S.C. 3416 and 3412(b)(1)(C).

> The Assistant Secretary does not believe it is in the interest of beneficiaries of vocational education throughout the nation to establish a standard policy to always delay plan approval pending resolution of complaints from a third party. It is essential that funds continue to flow to the states so that programs can operate at their current level. This also is in the interest of women and minorities served by vocational education. The Department does value the scrutiny of the public and considers such scrutiny essential in raising important issues that would otherwise escape the notice of program administrators. Third-party allegations are taken seriously, are reviewed in light of the law, and where it is indicated specific sanctions will be instituted to assure compliance with the law.

We recommend that the Assistant Secretary develop a written procedure for handling complaints from beneficiaries and their representatives.

III. Description and Analysis of the Mechanisms in the VEA and GEPA Used to Oversee the Appropriate Use of VEA Funds by States.

A. Introduction

When a recipient chooses to accept VEA funds, it agrees to adopt certain behaviors specified in the law and implementing regulations. In order to ensure that states: (1) agree to adopt all of the prescribed behaviors and (2) actually use VEA funds in accordance with their commitments, the Federal government is directed to perform certain oversight responsibilities. The major responsibilities include:

(1) reviewing and preparing written analyses of state plans and reports;

(2) conducting on-site reviews;

(3) conducting fiscal audits; and

(4) reviewing State Board rejections of Agency and Council recommendations.

Set out below is a description and analysis of these functions and mandates.

B. Reviewing and Preparing Written Analyses of State Plans and Reports

1. Description of the Legal Framework

Any state desiring to receive funds under the VEA must submit a five-year plan to the Secretary for approval.[14] The VEA also provides that each state must submit for the Secretary's approval an annual program plan and accountability report for each of the fiscal years included in the five-year state plan.[15] EDGAR provides that a state may continue to submit the annual program plan required by the VEA _or_ in lieu thereof may submit a three-year plan.[16] The accountability report must still be submitted on an annual basis.[17]

In carrying out his/her approval functions, the Secretary must provide for "_appropriate review_" of each state's five-year plan, annual program plan and accountability report by the _various agencies_ administering programs within the ED related to the programs proposed under five-year plans, annual program plans and accountability reports.[18]

---

[14] Sec. 107(a)(1) of the VEA (20 U.S.C. 2307(a)(1)); 34 C.F.R. §400.161.

[15] Sec. 108(a)(1) of the VEA (20 U.S.C. 2309(a)(1)).

[16] 34 C.F.R. §76.103.

[17] _Id_.

[18] Sec. 109(a)(3)(A) of the VEA (20 U.S.C. 2309(a)(3)(A)).

To guide the Secretary, the VEA regulations contain standards for the approval of five-year plans, annual program plans and accountability reports. With one exception, the same standards govern the approval of a five-year state plan, an annual program plan and an accountability report. A five-year plan, an annual program plan, and an accountability report cannot be approved until the Secretary:

> (1) makes "specific findings, *in writing*" as to the compliance of the five-year plan and annual program plan and accountability report with the provisions of the VEA and applicable regulations. (emphasis added)[19]

---

[19] Sec. 109(a)(1) and (2) of the VEA (20 U.S.C. 2309(a)(1) and (2)); 34 C.F.R. § 400.261(a) and § 400.261(a). The legislative history indicates Congressional concern about the quality of OE's review of state plans: "The Committee has serious doubts that any employee of the Bureau of Occupational and Adult Education even reads this material, other than to assure that all blanks are filled in." S. Rep. No. 94-882 at 69.

The rationale for requiring that the Secretary make written findings concerning compliance of state plans with the VEA is also set forth in the legislative history.

> Existing laws require that the Commissioner make "specific findings" that a state plan complies with the laws before he approves it. To the knowledge of the Committee, such findings have never been made, other than the signature of the Commissioner on the plan itself. Indeed, as expressed earlier, there are substantial indications that no one in the Office of Education even bothers to read through an entire state plan to ascertain whether it substantively meets the intent of the law.
>
> By requiring the specific findings to be put in writing, the Committee intends to make sure some federal official actually reads each state's annual program plan *and makes some substantive judgment that it meets the requirements of the Act*.

Id. at 75 (emphasis added).

(2) determines that the five-year plan and annual program plan and accountability report sets forth adequate procedures to insure that the assurances in the general application will be carried out.[20]

(3) determines that the five year plan and annual program plan and accountability report set forth adequate procedures to insure that the provisions of the plan will be carried out.[21]

(4) receives assurances that the full time personnel assigned to review programs within the state to assure equal access by men and women have had an opportunity to review the five year plan and annual program plan and accountability report. [22]

(5) determines that the plans contain the nationally uniform definitions and information elements contained in the vocational education data and occupation information data systems required by Sec. 161 of the VEA. [23]

---

[20] Sec. 109(a)(1) and (2) of the VEA (20 U.S.C. 2309(a)(1) and (2)).

[21] Sec. 109(a)(1) and (2) of the VEA (20 U.S.C. 2309(a)(1) and (2)); 34 C.F.R. §400.261(c) and §400.262(c).

[22] Sec. 109(a)(3)(B) of the VEA (20 U.S.C. 2309(a)(3)(B)); 34 C.F.R. §400.261(d) and §400.262(e).

[23] Sec. 109(a)(3)(C) of the VEA (20 U.S.C. 2309(a)(3)(C)); 34 C.F.R. §400.261(e) and §400.262(f).

The final standard governing approval of both five year plans and annual plans and reports provides that the Secretary may not disapprove a state plan and report solely on the basis of the distribution of state and local expenditures for vocational education.[24] This provision is taken from the Senate bill. The Senate Report contains the following explanation of the provision.

> The bill requires states to submit plans involving state and local funds, as well as federal funds so that the Commissioner may have an adequate basis for deciding whether the state's plan represents the best possible expenditure of federal funds, according to the purposes of the Act. Since states vastly over-match federal funds, submissions of information relating only to federal monies would not give the Commissioner an accurate picture of the state's total vocational education effort. However, the Commissioner's authority to disapprove a State's annual program plan is limited to its proposed allocation of federal funds. The Commissioner may not second guess state and local decisions concerning vocational education expenditures but, on the other hand, he must approve the expenditure of federal funds in the total context of all available funds for vocational education. 25/

24/ Sec. 109(b)(2) of the VEA (20 U.S.C. 2309 (b)(2)); 34 C.F.R. §400.271(b)).

25/ S. Rep. No. 94-882 at 75. ED interprets the statutory provision as applying to all state and local expenditures because "there is no legislative history to indicate otherwise." Comment, F.R. 53875.

The VEA also requires that the Secretary make an additional determination before approving an annual program plan and accountability report. Prior to approving an annual plan and report, the Secretary must also determine that the plan and report "show progress in achieving the goals set forth in the approved five-year state plan." (emphasis added)[26]

In applying the standards described above for approval of five-year plans and annual plans and reports, ED uses the standards set out in the regulations. The comments to the final regulations indicate that ED expressly rejected the idea of developing guidelines to govern the application of the standards in the regulations.[27] The apparent result of the application of the standards to a plan or report is a determination whether or not it is "substantially approvable."[28]

---

[26] Sec. 109(a)(2) of the VEA (20 U.S.C. 2309(a)(2)); 34 C.F.R. §400.262(d).

[27] The comments to the regulations indicate that the standards set forth in the regulations "are detailed enough to provide adequate criteria on the basis of which the Commissioner can determine whether the state is in compliance with the Act." Comment, 42 F.R. 53875.

[28] The term "substantially approvable" is used to refer to approval of annual program plans in at least two policy memoranda: BOAE/DSVPO FY 79-10 at 1 (June 29, 1979) and BOAE/DSVPO FY 70-11 at 1 (June 29, 1979). The term "substantially approvable" stems from 34 CFR §76.703(a)(1) of EDGAR. The effective date for ED to recognize obligations is the date the plan is submitted in substantially approvable form. Funds are not released to the state until the plan is actually approve

In order to assist states in operating the best possible programs of vocational education, the Secretary must, within four months of the receipt of a state's annual program plan and accountability report transmit to the state board an analysis of the plan and report, including suggestions for improvements in the state's programs and findings contained in any program or fiscal audits conducted by ED.[29]

2. Analysis of the Legal Framework

In general, the process set out in the VEA for reviewing and analyzing state plans and reports is sound. If the Federal government can clearly enunciate its expectations before it approves state plans, i.e., before funds are obligated, there is less likelihood that programs will be disrupted and a greater likelihood that on-site reviews during the year and audits conducted after the fact will not uncover problems. Furthermore, by comparing proposed to actual uses, OVAE can ensure accountability. Therefore, we recommend that the basic review and analysis functions be retained.

Notwithstanding our finding that the basic structure is sound, we have discovered several significant problems with the actual language of certain sections and the administration of these provisions by BOAE (now OVAE).

---

[29] Section 112(a)(1) of the VEA (20 U.S.C. 2312(a)(1)). In accordance with this statutory mandate, OVAE has instituted the process of conducting Management Evaluation Review for Compliance and Quality (MERC/Q). The MERC/Q establishes the relative degree of administrative and operational compliance with a previously approved state plan document. (Correspondence from Daniel B. Taylor to Ms. Ginny Looney, September 4, 1980).

The first issue is whether the five-year state plan, the annual program plan (now a three-year plan at the state's discretion) and the accountability report require appropriate and sufficient information for purposes of making an appropriate review. Since our study is limited to an analysis of state funds distribution and equity issues, we will limit our analysis to these areas.

We conclude that the statute and regulations as interpreted by OVAE, do not require that states submit appropriate information from which OVAE can make necessary determinations. This reluctance may be rooted in a historical misinterpretation by Federal officials concerning the scope of their authority under GEPA[30] to obtain necessary data. The House Report characterized the Federal administrator's interpretation as being "ridiculous on its face."

> It has been brought to the Committee's attention that some Federal administrators are interpreting the provisions of section 426 of the General Education Provisions Act as precluding them from requesting information from a State or from seeking to verify that information in order to determine whether the requirements of Federal law are being complied with. Section 426 was enacted in order to authorize the Office of Education to go beyond enforcing the requirements of Federal law to provide extra assistance to States, colleges and universities and other public agencies requesting this aid. It in no way was intended to limit Federal officials in carrying out their duties to assure that Federal law is being complied with. Any such interpretation is ridiculous on its face. [31]

The inadequacy of the data obtained by OVAE with respect to the funds distribution provisions is described below.

---

[30] H.R. No. 94-1085 at 29.

[31] Sec. 426(a) of GEPA, 20 U.S.C. 1231(c) authorizes the Commissioner to provide advise, counsel and technical assistance on request.

The inadequacy of the data obtained by OVAE raises serious problems for monitoring and enforcement of the funds distribution provision of the statute. Neither the statute, implementing regulations nor administrative policy guidelines and manuals offer a comprehensive "check-list" of information states are to provide to Federal administrators to assure their compliance with the statutory requirements. For example, Federal funds distribution manuals have required states to "describe and explain in detail the procedures used in the funding process" in the state plans,[32] but the criteria lists are legal conclusions rather than specific reporting standards.

As a result, the state plans usually provide a selective and incomplete picture of the funds distribution procedures which eliminate critical information. The NAACP Legal Defense Fund filed complaints concerning two states' methods of distributing funds which highlighted the dearth of functional data on the actual distribution patterns of VEA funds. We found in our review of four state plans that such basic information as the use of funding pools, the calculation of distribution formula scores for each recipient and the complete state and Federal vocational education funds distribution pattern was not provided. Often, what we identified to be abuses of Federal distribution requirements were identifiable only when more complete information became available

---

[32] See, e.g., Draft Manual for Federal Funds Distribution Procedures, BOAE/DSVPO 11/79.

A second issue raised by the legal framework concerns the timing of policy interpretations and resulting demands for modifications of state policies by OVAE. One of the central themes of our interviews with state directors was that although they may disagree with the structure of VEA and certain provisions, once the state accepts VEA funds, it is willing to live up to its commitments. However, state directors felt that it is unconscionable to change the "rules of the game" in midstream, especially when a state plan has already been approved. This practice is destroying the Federal/state relationship. For example, the process of approving a state's VEA funds distribution formula in one year only to have it disapproved in the next year based on a revised interpretation, and then to have it disapproved again in a third year based on yet a third interpretation undermines the whole Federal role.

For example, one state's annual plan and distribution formula was approved and used to distribute VEA funds for one year. In the MERC-Q for that program year, the formula was found to be out-of-compliance under a changed BOAE interpretation. In a letter to the state, BOAE's representatives said: "where we are committed to improving the consistency of our policy interpretations, we must reserve the right for the government to correct its interpretations which are made in error. We hope, of course, that the ability to correct interpretations made in error will more often work to the benefit of the states and the individual taxpayers that it will work to their detriment."[33]

---

[33] Letter, Dunham to Gentry (Oct. 18, 1978).

In short, reversals of interpretation by ED undermine the Federal/state partnership. The question remains, what, if anything, can be done to address this situation. There are certain principles that must guide this issue. First, when the government seeks to enforce a public right or protect a public interest, it is acting in its sovereign capacity and cannot be disabled by past actions of its officers and agents. [34] Second, government officials are prohibited from waiving statutory and regulatory provisions. [35] Third, states have a right to know in advance what the "rules of the game" will be so that they can decide whether or not to play the game.

Consistent with these principles, we recommend that VEA or GEPA be amended to provide that where ED reverses a clearly articulated and universally applied policy in the middle of the school year, the new policy will not become effective until the beginning of the next school year. This recommendation should not be construed as excusing states which relied on oral statements or actions by Federal officials (*e.g.*, plan approval) that are contrary to clearly articulated pre-existing Federal policies since waivers of statutory and regulatory provisions are prohibited as being contrary to public policy.

---

[34] See, *e.g.*, *United States v. Brady*, 355 F. Supp. 1347, 1351 (S.D. Fla. 1974). *But see County of Alameda v. Weinberger*, 520 F.2d 344 (9th Cir. 1975).

[35] See Section 421A of GEPA and 34 C.F.R. §76.900.

C. Conducting On-Site Reviews

1. Description of the Legal Framework

The VEA provides that in order for the Federal government to assist the states in operating the best possible programs of vocational education, OVAE must, in at least ten states each year, conduct a review analyzing the strengths and weaknesses of the programs assisted with VEA funds.[36]

This provision was added in response to the following finding made by the House Committee on Education and Labor:

> It seems that what is occurring now is that the Office of Education is demanding a great deal of paperwork and detailed data from the States and local school districts but then there is no follow-up to determine whether the States are complying with the law and no efforts are being made to assist the States in operating their programs better. In other words, a blind concentration on seeking compliance on paper with the process has led to a total neglect of trying to seek the results the process was created to achieve.[37]

OVAE implements this mandate by conducting Monitoring Evaluation Reviews for Compliance (MERC).

2. Analysis of the Legal Framework

We conclude that the requirement is sound and should be retained. The major issue regarding the reviews is administrative in nature, i.e., the capacity of OVAE to design review instruments and conduct high quality reviews. A general assessment of OVAE performance of this function is beyond the scope of this study. However, we were able to assess the adequacy of its review of the state VEA funds distribution issue. We conclude that OVAE has not demonstrated the capacity to monitor the implementation of the fund distribution provisions. As one state director explained:

---

[36] Section 112(a)(2) of VEA (20 U.S.C. 2312(a)(2)).

[37] H.R. Rep. No. 94-1085 at 17.

> "OVAE was so concerned with the minutiae that it missed the big picture. We changed certain provisions in order to come into technical compliance without changing the effect, which was consistent with state objectives but probably inconsistent with the spirit of the VEA."

D. Conducting Fiscal Audits

1. Description of the Legal Framework

The VEA provides that ED must, in the same period during which it monitors the strengths and weaknesses of programs, conduct fiscal audits of such programs within those states.[38] Within ED, audits are conducted by the Office of the Inspector General. Pursuant to government-wide standards, audits are generally fiscal and compliance in nature.[39]

2. Analysis of the Legal Framework

Congress should clarify whether it meant to modify government-wide practice of conducting fiscal and compliance audits when it prescribed fiscal audits under VEA but was silent as to whether it expected that the audits conducted by the Office of the Inspector General would also include a compliance component.

---

[38] Section 112(a)(2) of the VEA (20 U.S.C. 2312(a)(2)).

[39] *See* OMB Circular A-102, Attachment P.

E. Reviewing State Board Rejections of Agency and Council Recommendations

1. Description of the Legal Framework

As explained supra, any state desiring to receive funds under the VEA must submit to the Secretary a five-year state plan and an annual program plan for each year covered in the five-year plan.[40]

In formulating the five-year and annual plans, the State Board is required to involve the active participation of a representative of:

> (1) The state agency having responsibility for secondary vocational education programs, designated by that agency;
>
> (2) The state agency, if a separate agency exists, having responsibility for postsecondary vocational education programs, designated by that agency;
>
> (3) The state agency, if a separate agency exists, having responsibility for community and junior colleges, designated by that agency;
>
> (4) The state agency, if a separate agency exists, having responsibility for institutions of higher education in the state, designated by that agency;
>
> (5) A local school board or committee, as designated by the appropriate appointing authority under state law;
>
> (6) Vocational education teachers, as designated by the appropriate appointing authority under state law;
>
> (7) Local school administrators, as designated by the appropriate appointing authority under state law;
>
> (8) The State Manpower Services Council appointed under the authority of Section 107(a)(2)(A)(1) of the Comprehensive Employment and Training Act of 1973 designated by that Council;

---

[40] Sec. 107 and 108 of the VEA (20 U.S.C. 2307 and 2308).

(9) The state agency or commission responsible for comprehensive planning of postsecondary education which planning reflects programs offered by public, private nonprofit, and propriety institutions, and includes occupational programs at a less-than baccalaureate degree level, if a separate agency or commission exists, designated by that agency or commission; and

(10) The state advisory council on vocational education designated by that council.[41]

In the event these specified representatives in the five-year and annual plan development process cannot agree on a final plan, the State Board must make the final decisions regarding the provisions of the plan.[42] If, due to disagreement, the State Board is compelled to make the final decision, it must include in the plan, the following: (a) the recommendations rejected by the board; (b) the agency, council or individual making such recommendation; and (c) the reasons for rejecting these recommendations. Any representative of an agency or council in categories (1) through (4) and (8) through (10) above who are dissatisfied with the final decision of the State Board can appeal the board's decision to the Secretary.[43]

---

[41] Secs. 107(a)(1) and 108(a)(1) of the VEA (20 U.S.C. 2307(A)(1) and 2308(a)(1)).

[42] Sec. 107(a) of VEA (20 U.S.C. 2307(a)); 34 C.F.R. §400.164.

[43] Sec. 107(a) of VEA (20 U.S.C. 2307(a)); 34 C.F.R. §400.281. See also comments, 42 F.R. 53872 (Oct. 3, 1977).

Specifically, Section 107(a)(1) of the VEA provides:

> Any agency or council described above, which is dissatisfied with any final decision of the state board may appeal the board's decision to the Commissioner. In such a case, the Commissioner shall afford such agency or council and the state board reasonable notice and opportunity for a hearing and shall determine whether the state board's decision is supported by substantial evidence, as shown in the state plan, and will best carry out the purposes of the Act. Any agency or state board dissatisfied with a final action of the Commissioner under this subsection may appeal to the United States Court of Appeals for the circuit in which the state is located in accordance with the procedure specified in section 434(d)(2) of the General Education Provisions Act.

The legislative history explains the intent of the provisions requiring consultation with councils and agencies but does not expressly explain the rationale for involving the Secretary.

> The reasons the Committee adopted these provisions requiring the state board to actively involve these other agencies and councils in writing the state plan have been alluded to earlier. The Committee believes that the needs of all people within the states will be better served by this broad consultation in deciding how to spend federal funds and that the vocational education program will eventually emerge as a much stronger, more realistic program.[44]

The regulations implementing Section 107(a)(1)[45] generally repeat the provisions of 107(a)(1). However, they also set out a procedural framework within which to bring the appeals. One of these procedural steps provided for a prehearing conference which could be called at the option of the hearing officer for the purpose of, among other things, simplifying the issues prior to a formal hearing.

---

[44] H.R. Rep. No. 94-1085 at 36.

[45] See 34 C.F.R. § 400.281 through § 400.289.

In fiscal year 1978, two appeals were initiated.[46] Both of these appeals, however, were settled at the prehearing stage without necessitating a formal decision by the Commissioner.

Later the same year, another appeal was initiated.[47] Before a prehearing conference could be convened, however, the chief state officer notified the hearing officer assigned to the case that the dispute would be resolved within the state. Thus, this appeal was also withdrawn before the Commissioner was compelled to reach a decision. No other appeals were initiated.

2. Analysis of the Legal Framework

In general, the structure of the VEA authorizes the Secretary of ED to determine whether the states are complying with mandates set out in the law. A state retains responsibility and authority to choose, from among alternative authorized behaviors, which behaviors will best carry out the purposes of the Act. The provision which permits the Secretary to overrule a decision by a state board regarding how to best carry out the purposes of the Act is inconsistent with this basic structure of the Act. We recommend that the phrase "will best carry out the purposes of the Act" be deleted or clarified.

---

[46] Appeals were initiated in Louisiana and Oklahoma.

[47] The appeal was from West Virginia.

We conclude that the inclusion of an appeal process for the councils and agencies is appropriate and should be retained. However, the standard of review used by the Secretary should be whether the state board's decision is consistent with the VEA and implementing regulations.

G. State Advisory Councils on Vocational Education

Any state which desires to participate in VEA programs must establish a state advisory council (SACVE).[48]
The SACVE shall among other things, evaluate vocational education programs, services, and activities assisted under the VEA and prepare an annual evaluation report.

The project did not analyze this provision and therefore has no specific findings, conclusions, or recommendations.

---

[48] See Section 105 of the VEA (20 U.S.C. 2305); 34 C.F.R. §400.91-§400.97.

IV. Description and Analysis of the Sanctions Used by ED to Secure Compliance

A. Introduction

Under certain circumstances, states fail to meet the minimum conditions necessary to qualify for assistance or fail to implement VEA programs in accordance with their commitements. In order to ensure the integrity of the program, the VEA includes sanctions which the Secretary must use to secure compliance. The sanctions set out in the VEA are supplemented by sanctions set out in GEPA(and EDGAR). The applicable sanctions set out in the VEA and GEPA (and EDGAR) are:

(1) Disapproving state plans and reports submitted by states;

(2) Withholding and suspending payments for failure to properly use VEA funds;

(3) Repayment of funds based on audit exceptions;

(4) Cease and desist orders; and

(5) Payback provisions.

Set out below is a description and analysis of the sanctions used by ED for securing compliance with the VEA.

B. Withholding Approval of the State Plans and Reports

1. Description of the Legal Framework

Before the Secretary can finally disapprove a five-year plan or annual plan and accountability report (or any modification thereof), he/she must first give the State Board reasonable notice and opportunity for a hearing.[49] A state may seek judicial review of a final action by the Secretary regarding the state plans and reports.[50]

---

[49] Sec. 109(b)(1) of the VEA (20 U.S.C. 2309(b)(1)). *See also* 34 C.F.R. §76.201-§76.202.

2. Analysis of the Legal Framework

The authority to disapprove a state plan, thereby prohibiting the state from obligating VEA funds, is an effective device for ensuring that state policies are consistent with the VEA. Problems which have surfaced concerning the use of the authority to disapprove state plans and reports relate to OVAE's capacity and commitment to use the sanctions. Our findings in this regard are reported supra. One issue regarding the disapproval sanction concerns the relationship between this authority and the other sanctions. For example, we recommend that the VEA be amended to clearly indicate that the Secretary may not approve state plans until the state has corrected all problems identified in monitoring and auditing reports.

C. Withholding and Suspending Payments

1. Description of the Legal Framework

If the Secretary, after giving reasonable notice and opportunity for a hearing to the State Board, finds that: (1) the state plan or program plan and report has been so changed that it no longer complies with the VEA; or (2) in the administration of the plan or program plan and report, there is a failure to comply substantially with any provisions of the VEA, the Secretary must notify the State Board that:

---

[50] Section 109(d) of the VEA (20 U.S.C. 2309(d)).

> no further payments will be made to the State under [the VEA] (or, in his discretion, further payments to the State under [the VEA] will be limited to programs under or portions of the State plan or program plan and report not affected by such failure) until he is satisfied that there will no longer be any failure to comply.[51]

GEPA and EDGAR authorize the Secretary to withhold payments in whole or in part or suspend payments pending the resolution of a due process hearing.[52] States may appeal final actions by the Secretary with respect to the withholding of VEA funds.[53]

The Office of General Counsel has issued a legal opinion which describes OVAE's options for enforcing the set-aside provisions of the VEA.[54] One of the options available to the Secretary described in the legal opinion is the authority to withhold or suspend payments.

> With respect to the amount of funds subject to suspension or termination under Section 434(c) of GEPA, Section 109(c) of the VEA permits the Commissioner, in his discretion, to continue payments to the programs under the State plan not affected by the finding of noncompliance. This provision may be construed to allow the Commissioner to penalize any of those funds impacted by the specific set-aside requirement (e.g., $50,000 for full time personnel). Alternatively, the Commissioner could subject all VEA funds to termination or suspension.

---

[51] Section 109(c) of the VEA (20 U.S.C. 2309(c)). The MERC/Q as well as the MERC is used to determine whether withholding is appropriate. OVAE has explained that "remedial actions are always required when noncompliance is found with any of the statute's provisions. However, only when substantial noncompliance is discovered is the Department empowered to consider using the process of legally notifying the state that funds were being withheld." (Correspondence from Daniel B.Taylor to Ms. Ginny Looney, September 4, 1980).

[52] See Section 453 of GEPA and 34 C.F.R. §78.21-§78.28.

[53] Section 109(d) of the VEA (20 U.S.C. 2309(d)).

[54] OVAE Legal Opinions Handbook at 150-153.

Dr. Cornelson, Director of the Division of State Vocational Programs in OVAE, has issued a different interpretation. Dr. Cornelson has explained that the failure to spend the minimum amount specified in a set-aside constitutes a statutory violation: [55]

> As the Secretary has no waiver authority in the VEA to excuse a State from its statutory mandate of complying with minimum percentage requirements (Section 100b.900 of the Education Division General Administrative Regulations (EDGAR)), we do not characterize the lapsing of Federal funds as one of the options available to enforce the minimum percentage requirements. In addition, a failure to spend the minimum percentage of funds as required would risk denying this specified group of persons an equal educational opportunity.
>
> If the funds set aside for LESA students are not spent and are allowed to lapse, the State has violated the Act by not spending funds for a required national priority purpose. Returning such funds to the U.S. Treasury does not absolve the State of its obligation or obviate its violation of the law. The Secretary will apply appropriate sanctions as necessary on an individual basis.

2. Analysis of the Legal Framework

The actual withholding or suspension of Federal funds is often thought of as a draconian strategy which ends up hurting the beneficiaries of the program. Although this may be true in theory, there are several reasons for retaining the provision. First, the provision still serves as a viable deterrent, especially in light of the provisions which permit withholding in whole or in part. This authority to withhold "in whole or in part" means that the Federal government can make certain that the "punishment fits the crime." Second, if a state or school district hires staff with VEA funds and the Federal government withholds funds there is a reasonable likelihood that political pressures will be brought to bear on the recipient to retain the individuals rather than laying them off. During the withholding period, salaries normally paid for out of VEA are paid out of state or local funds.

---

[55] Staff Bulletin-OVAE/DSVPO-SB-80-6 (August 5, 1980) at 3 and 4.

The major issues concerning the withholding and suspension of VEA funds are whether the opinion enunciated by the Office of General Counsel or the Director of the Division of State Vocational Programs in OVAE regarding the applicability of withholding to violations of the set-aside provisions is consistent with the law and whether there are sanctions which may be used in conjunction with or in lieu of withholding.

With respect to the use of withholding for violations of the set-asides, the OGC opinion states that if a state failed to spend $50,000 for a full-time sex equity coordinator, OVAE could withhold $50,000 or subject all VEA funds to termination. Dr. Cornelson's interpretation is that returning set-aside funds to the U.S. Treasury does not absolve the state of its obligation or obviate its violation of the law. Appropriate sanctions must be applied on an individual basis.

Given the importance Congress placed on sex equity (and the other set-asides), it would appear that the withholding of

$50,000 set-asides for the sex equity coordination would not serve as an effective sanction if the state could continue to receive VEA assistance and no longer have to worry about this set-aside. A more appropriate sanction, i.e., a punishment which would "fit the crime" might be to withhold the funds for state administration. We recommend that Congress clarify the applicability or the withholding provisions to the set-asides.

The second issue concerns the use of alternatives to withholding. When Congress reauthorized Title I of ESEA in 1978, it was faced with the issue of whether to modify the withholding provision. Congress decided to permit withholding in whole or in part and also added two new provisions. First, Congress required that the Secretary issue a public notice of the pending withholding action.[56] Second, Congress authorized the Secretary to enter into a compliance agreement with a state in lieu of withholding.[57] Under a compliance agreement, a state would admit that it was in noncompliance and agree to take specific steps to come into full compliance within a prescribed period. During the period in which the agreement is in effect, the state would not be subject to an audit.

We recommend that Congress consider adding these provisions to the VEA or GEPA.

---

[56] Section 186(b) of Title I (20 U.S.C. 2836(b)).

[57] Section 186(c) of Title I (20 U.S.C. 2836(c)).

D. Recoupment of Misspent Funds

1. Description of the Legal Framework

The VEA requires that the Inspector General of ED conduct audits, but does not clarify the procedure for securing repayment of misspent funds. Section 456 of GEPA and the implementing regulations,[58] describe the review procedures available to recipients. The regulations do not however clearly indicate which funds may be used to repay ED.

The same issue faced Congress in 1978 when it reauthorized Title I of ESEA. Congress clearly indicated in the 1978 Amendments the answer to this question. Section 185(b) of Title I provides that:

> Where, under such procedures, the audit resolution process requires the repayment of Federal funds which were misspent or misapplied, the Commissioner shall require the repayment of the amount of funds under this title which have been finally determined through the audit resolution process to have been misspent or misapplied. Such repayment may be made from funds derived from non-Federal sources or from Federal funds no accountability for which is required to the Federal Government. Such repayments may be made in either a single payment or in installment payments over a period not to exceed three years.

This provision ensures that the beneficiaries of the program do not suffer a double penalization -- once because the state failed to use the money properly in the first place and a second time if the agency could simply accept a smaller appropriation in a subsequent year. We recommend that Congress adopt a similar provision in the VEA or GEPA.

---

[58] 34 C.F.R. §78.11-§78.16.

E. Cease and Desist Orders

The Education Amendments of 1978 amend GEPA to authorize the Secretary to secure a cease and desist order from the Education Appeals Board in order to prevent a recipient from continuing to engage in illegal practices.[59] A cease and desist order, which issues from an agency with oversight authority can operate in two ways: (1) to order that an action or practice be stopped; and/or (2) to order that a particular action or practice be commenced. We recommend that this provision be retained.

F. Payback Provision

One of the major improvements to the enforcement scheme applicable to all Federal programs, including the VEA, was the addition of the payback provision.[60] Under the payback provision the Secretary, after receiving a check from the state for the full amount of the misspent funds, may return 75 percent of those funds to the state as an addition to its current entitlement, if it agrees to use the money legally this time around. This provision ensures that the intended beneficiaries receive the programs they initially should have received.

---

[59] Section 454 of GEPA (20 U.S.C. 1234c). The Education Appeals Board has used this authority to direct a school district to repeal policies concerning parent involvement which contravened policies in Title I of ESEA. It has not been used for VEA-specific practices to date.

[60] Section 456 of GEPA (20 U.S.C. 1234e). To date, the Secretary has not taken advantage of this authority.

V. Description and Analysis of Oversight Mechanisms in VEA and GEPA Used to Ensure Compliance by LEAs and Other Eligible Recipients

A. Introduction

Once the state secures approval of its state plans, it distributes VEA funds to LEAs and other eligible recipients. LEAs and other eligible recipients are generally responsible for delivering vocational education services to students. In order to ensure that the VEA funds are used in accordance with the VEA, the implementing regulations, and state guidelines, the VEA includes certain oversight mechanisms. The mechanisms included in the VEA are supplemented by provisions in GEPA and EDGAR. The major provisions include: 61/

. Review of applications;

. Evaluations;

. Monitoring;

. Auditing; and

. Complaint resolution.

In addition, the VEA establishes Local Advisory Councils to advise recipients with respect to certain aspects of their vocational education program.

61/ Section 434(a) of GEPA authorizes the Secretary to require that a state submit a plan for monitoring compliance with the VEA. The Secretary may require the plan to provide: (1) for periodic on-site visits; (2) periodic audits; and (3) investigation of complaints. To date, the Secretary has not exercised this authority with respect to the VEA.

B. Review of Applications

1. Description of the Legal Framework

An eligible recipient desiring to receive assistance under the VEA must submit an annual application to the state.[62] VEA funds will be distributed to eligible recipients "on the basis" of such applications.[63] The legislative history identifies two major purposes of this requirement. First, the House explains[64] that the requirement strengthens the ability of local agencies to focus their efforts on the greatest needs. The Senate explains[65] that the requirement provides state boards with the necessary information to make hard choices among competing applications for scarce resources. Further, information submitted by eligible recipients will provide a substantial base for deciding whether to continue to fund existing programs or fund new and innovative programs.[66]

---

[62] Sec. 106(a)(4) of VEA (20 U.S.C. 2306(a)(4)); 34 C.F.R. §400.141(f).

[63] Id.

[64] H.R. Rep. No. 94-1085 at 34.

[65] S. Rep. No. 94-882 at 70.

[66] Id.

The statute identifies six criteria which an annual application prepared by an eligible recipient must satisfy.[67] These criteria are described below.

First, all applications must have been developed in consultation with representatives of the educational and training resources (including prime sponsors) available in the area to be served by the applicant.

Second, the application must describe the vocational education needs of potential students in the area or community served by the applicant.

Third, the application must indicate how and to what extent the program proposed in the application will meet the needs of the potential students.

Fourth, the application must describe how the findings of any evaluations of programs operated by the applicant have been used to develop the program proposed in the application.

Fifth, the application must describe how the proposed activities relate to manpower programs conducted by prime sponsors under CETA.

Sixth, the application must describe the relationship between vocational education programs proposed to be conducted with VEA funds and other programs in the area which are supported only by state and local funds.

---

[67] Sec. 106(a)(4)(A)-(D) of VEA (20 U.S.C. 2306 (a)(4)(A)-(D)); 34 C.F.R. §400.141(f)(4)(A)-(D). Eligible LEAs must submit general assurances set out in section 436(a) and (b) of GEPA, as amended in 1978. This new provision in GEPA does not relieve the state from collecting or the LEA of supplying additional or more specific information or assurances required under VEA. Further, the requirements of section 436(a) and (b) of GEPA do not extend to other eligible recipients under VEA. See Policy Memorandum BOAE/DSVPO FY79-15 at 3.

The State Board in its five-year state plan, must describe the information which it will require in the local applications in order to satisfy the six criteria.[68] In addition to the six criteria described above, the VEA expressly requires that eligibl recipients operating certain types of programs (e.g., provision of stipends (§104.573) and placement services (§104.583)) include specified information in their applications. In addition, the state board may require additional information it deems necessary.[69]

EDGAR lists a number of additional conditions which an LEA or other eligible recipient must satisfy including, among other things, an agreement to keep records to show compliance with program requirements.[70]

2. Analysis of the Legal Framework

The applications developed by the states generally required the information necessary to meet the standards set out in the VEA.[71] However, the nature and extent of information requested and the information required to be kept on file varied extensively from state to state. In several of the states included in our project, the applications contained virtually no information that would enable the state to ascertain the quality of the local project.

One of the most striking aspects of the VEA is the dearth of requirements applicable at the local level -- the level at which programs are actually designed and implemented. Thus, it is not always possible for a state to determine how a local recipient actually plans on using the VEA funds, e.g., how it distributes funds among schools, targets funds on specific children, and implements specific programs. The VEA does not require that all states devise a system under which an initial accountability system is established. Congress should reassess the viability of the present structure which has extensive and, in some respects, excessive requirements at the state level and a dearth of requirements applicable at the local level. Local level requirements are often necessary to increase the likelihood that programs will be of sufficient size, scope, and quality to give reasonable promise of success.

---

[68] Sec. 106(a)(4) of VEA (20 U.S.C. 2306(a)(4)); 34 C.F.R. §400. 182(a); and 34 C.F.R. §76.400-§76.401.

[69] *See* letter from Buzzell to Mr. Raymond Parrott (Jan. 1, 1978).

[70] *See* generally Subpart F of EDGAR and 34 C.F.R. §76.731 (recordkeeping).

[71] As explained *supra*, we conclude that the requirements in the VEA applicable to local recipients are inadequate.

C. State Evaluations

1. General Evaluations by the State Board

The VEA requires the states, during the five-year period of the state plan, to evaluate the effectiveness of programs within the state receiving assistance under the VEA in order to assist local educational agencies and other eligible recipients to operate the best possible vocational education programs.[72] The results of the evaluations must be used to revise the state's programs.[73] The completed evaluations must be made readily available to the state advisory councils.[74]

The regulatory provisions concerning the general evaluation are more detailed than the provisions in the Act.[75] Section 400.402 of the regulations requires the State Board, during the five-year period of the state plan, to evaluate in "*quantitative terms*" the effectiveness of each "*formally organized program or project*" supported by "*Federal, state and local funds*." These evaluations must be in terms of the program's planning and operational process, results of student achievement, results of student employment and results of services to special populations.

---

[72] Sec. 112(b)(1)(A) of VEA (20 U.S.C. 2312(b)(1)(A)).
[73] Id.
[74] Id.
[75] 34 CFR § 400.402.

2. Special Data for Completers and Leavers

In order to assist eligible recipients in operating the best possible programs, the VEA *also* requires the states to conduct special evaluations for programs "which purport to impart entry level job skills."[76] These program evaluations must employ, wherever possible, statistically valid sampling techniques to determine the extent to which program completers and leavers: (1) find employment in occupations related to their training; and (2) are considered to be well-trained and prepared for employment by their employers. However, the fact that a program leaver or completer chooses to pursue additional education or training may not be considered negatively in these evaluations.[77]

---

[76] Sec. 112(b)(1)(B) of VEA (20 U.S.C. 2312(b)(1)(B)). The House Report explains that the phrase "programs. . . which purport to impart entry-level job skills" includes "any program which is preparing persons for immediate employment or which is providing advanced training which includes the teaching of skills which would make a person immediately employable. We do *not* mean to include programs which are purely introductory or preparatory to actual job training." H.R. Rep. No. 94-1085 at 39.

[77] *Id.*

The regulations also provide that the state must report separately on program completers and leavers in accordance with instructions and standards provided by the National Center for Educational Statistics as follows:

(1) Those who secure employment in the occupation for which they were trained or in occupations related to their vocational training, including the military;

(2) Those in paragraph (1) above considered by their employers to be well trained and prepared for employment;

(3) Those who are enrolled for additional education and training; and

(4) Those in none of the above categories.[78]

Section 161 of the VEA requires the Secretary and the Administrator of the National Center for Education Statistics (NCES) to develop a national Vocational Education Data Reporting and Accounting System (VEDS). To ensure that the evaluation data regarding program completers and leavers is compatible between the states and to ensure that this data can be aggregated and reported for all states, each state is required to utilize in its data collection and reporting the information elements and uniform definitions developed for the national vocational education data reporting and accounting system.[79]

---

[78] 34 C.F.R. §400.404(d).

[79] 34 C.F.R. §400.405.

3. OVAE Policy

On April 24, 1979, OVAE issued a policy memorandum which sets out its definition of "program" in the context of section 112 and addresses the subjects of sampling, the five-year evaluation cycle, and the aggregation of results.[80]

(a) Program --

"Program" (or project) can be either an "instructional program" or a "legislative program." An instructional program is a planned sequence of courses, services, or activities designed to meet a particular occupational objective.[81] A legislative purpose program is a course, service, or method of instruction which has been established by the state in response to legislative priorities; however, it is not necessary for a legislative purpose program to be primarily concerned with providing vocational skills.[82] Instructional and legislative purpose programs should be reported by six-digit codes whenever possible. The legislative purpose programs which cannot be reported by six-digit code should be reported by legislative purpose.[83]

---

[80] BOAE Policy Memorandum, BOAE DSVPO - FY/79-2 at 1.

[81] Id.

[82] Id.

[83] Id.

(b) Sampling --

The VEA requires each state to "evaluate the effectiveness of each program within the state" supported by VEA funds.[84] In certain circumstances, however, OVAE will not require the states to evaluate programs in all LEAs or OERs.[85] Instead, it will accept the evaluation of a representative sampling of programs in satisfaction of the states' responsibilities under section 112(b)(1)(A) of VEA.[86] The following excerpt from a OVAE policy memorandum presents an example of circumstances that would justify the use of sampling:

> For example, each of the six-digit code instructional programs must be evaluated within the period covered in the approved Five-Year Plan. But, if a state is operating 100 auto mechanic programs (a six-digit code) throughout the state, it may design a representative sample of such programs in cooperating LEAs/OERs which would generate reliable and valid statistics for all 100 auto mechanics programs. In the case of legislative purpose programs, if the state is operating a large number of displaced homemaker programs, it similarly could design a representative sample that would generate reliable and valid statistics for all displaced homemaker programs without evaluating all such programs. When the total universe(N) in a given

---

[84] Sec. 112(b)(1)(A) of VEA (20 U.S.C. 2312).

[85] OVAE Policy Memorandum, OVAE DSVPO - FY/79-2 at 2.

[86] Id.

> program or state is too small for reliable sampling, each individual program should be evaluated. [87]

OVAE cautions the states, however, that such sampling does not supersede the VEA's sampling requirements nor the requirements regarding the collection of data on program completers and leavers for each program that purports to impart entry level job skills under section 161(a)(1) of the VEA and section 400.404 of the regulation.[88]

(c) Five-Year Evaluation Cycle --

The VEA requires the evaluation of each VEA funded program within the state "during the five-year period of the state plan."[89] OVAE has encouraged the states to develop a cyclical pattern of evaluation that will facilitate the evaluation of "an appropriate proportion" of instructional and legislative purpose programs each year.[90] OVAE also informed the states that it is not necessary to wait until a program has been completed before conducting an evaluation, and evaluation of programs more frequently than once every five years is permissible.[91]

---

[87] Id.

[88] Sec. 112(b)(1)(A) of VEA (20 U.S.C. 2312).

[89] OVAE Policy Memorandum, OVAE DSVPO - FY/79-2 at 2.

[90] Id.

[91] Id.

(d) Aggregate of Evaluation Results --

The data collected by the states pursuant to sections 400.402(a) and (6) of the regulations will not be aggregated by ED. OVAE explains that such an aggregation would be an expensive and time consuming process requiring "national standardization of evaluation methodologies, instruments, and procedures used by the states."[92]

D. Monitoring

1. Description of the Legal Framework

The VEA does not explicitly require that states monitor LEAs and other eligible recipients for compliance with the VEA. However, GEPA and EDGAR provide that the state must develop and use procedures to monitor each project.[93]

2. Analysis of the Legal Framework

Several of the states we visited had not developed a systematic procedure for monitoring programs for compliance with the VEA. In other words, the states had not developed policies regarding: (1) the purpose and scope of monitoring; (2) frequency of visits; (3) procedures for issuing monitoring reports; (4) procedures for responding to reports; and (5) procedures for following up on recommendations. Congress should consider clarifying the nature of the state's monitoring responsibilities under the VEA to require the development of procedures which address the five areas described above.

---

[92] Policy Memorandum-BOAE DSVPOFY79-2 (April 23, 1979).

[93] Section 434(a)(1) of GEPA (20 U.S.C. 1232c(a)(1)); 34 C.F.R. §76.772.

E. Auditing

1. Description of the Legal Framework

The VEA is silent with respect to the responsibility of the state to audit local programs to ensure that VEA funds have been used in compliance with the VEA. Section 434(a)(2) of GEPA provides that the Secretary may require that states provide for periodic audits of VEA funds. Although EDGAR does not explicitly make the auditing requirement mandatory on states with respect to VEA funds, it does require that the state must

> develop procedures, issue rules, or take whatever action may be necessary to properly administer each program and to avoid illegal, imprudent, wasteful, or extravagent use of funds by...the subgrantee.[94]

2. Analysis

The states included in our survey were generally unaware of this provision. Audits, to the extent performed, were conducted by CPAs hired by the recipient and were simply part of an overall fiscal audit of all funds.

F. Complaint Resolution

1. Description of the Legal Framework

The VEA is silent with respect to the establishment of a written procedure for resolving complaints. However, EDGAR pro-

---

[94] 34 C.F.R. §76.772(a)(4). See also OMB Circular A-102, Attachment P.

provides that the state must develop written complaint resolution procedures.[95]

2. Analysis of the Legal Framework

The states we visited were generally unaware of this requirement.

---

[95] 34 C.F.R. §76.780-.783. *See also* Section 434(a)(3) of GEPA.

VI. Sanctions Which States May Use to Secure Compliance

A. Introduction

The final section of this chapter describes and analyzes the sanctions which states may use against LEAs and other eligible recipients to secure compliance with the provisions of the VEA. Specifically, this section discusses the disapproval of applications and the suspension and withholding of funds.

B. Description of Sanctions

The VEA enunciates one sanction which a state may use against a noncompliant LEA or other eligible recipient; namely the disapproval in whole or in part of an application.

Any eligible recipient dissatisfied with final action by a state concerning the application must be given reasonable notice and opportunity for a hearing.[96] The procedures for providing such a hearing must be set out in the five-year state plan.[97]

In addition, GEPA and Part 74 regulations authorize States to suspend payments and withhold funds for failure of an LEA or other eligible recipient to substantially comply with VEA requirements. Specifically, a state may withhold payments, in whole or in part, if the state finds, after reasonable notice and opportunity for a hearing before an impartial hearing officer, that the local agency has failed to comply with any of the VEA requirements.[98] The state may suspend payments, in whole or in part, under the program if the state has reason to believe that a local agency has failed substantially to comply with the VEA requirements, except that (1) the state may not suspend payments until 15 days after the state provides the local agency an opportunity to show cause why such action should not be taken, and (2) no suspension may continue in effect longer than 60 days unless the state provides notice for a withholding hearing.[99]

---

[96] Sec. 106(a)(4) of VEA (20 U.S.C. 2306(a)(4)); Sec. 434(b)(1) of GEPA; 34 C.F.R. §400.141(f)(4); 34 C.F.R. 76.400-.401. Eligible recipients dissatisfied with the state board's determination may seek judicial review.

[97] Section 106(a)(4) of VEA (20 U.S.C. 2306(a)(4)); 34 C.F.R. §400.182(b).

C. Analysis of Sanctions

The system of sanctions available to states under the VEA and GEPA is inadequate. States are reluctant to withhold or suspend VEA funding because of the disruptive effect on local programs. The use of a state compliance agreement (comparable to the provision in Title I, as amended in 1978[100]) in lieu of withholding, is not available under VEA or GEPA. We recommend that the Title I compliance agreement be made applicable to the VEA, either through an amendment to VEA or GEPA.

Furthermore, neither the VEA nor GEPA (or EDGAR) prescribe the procedures which states must use to secure repayment of mispent funds in accordance with a state audit. We recommend that e procedures set out in Title I be adopted.[101]

Sec. 434(b)(3) of GEPA (20 U.S.C. 1232c(b)(3)).

ee 434(b)(2) of GEPA (20 U.S.C. 1232c(b)(2)); See also 34 F.R. §74.116 which incorporates by reference the authority suspend and terminate grants (§74.114 and §74.115).

. 169(c) of Title I (20 U.S.C. 2816(c))

170 of Title I (20 U.S.C. 2817).